United States Circuit Court of Appeals

For the Ninth Circuit.

MAINE NORTHWESTERN DEVELOPMENT COMPANY, a corporation,
Appellant,
vs.
NORTHWESTERN COMMERCIAL COMPANY, a corporation,
Appellee.

No. 2773

Transcript of Record

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

MET. PRESS, SEATTLE

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON,

NORTHERN DIVISION.

INDEX.

NAMES AND ADDRESSES OF COUNSEL.

WILLIAM H. GORHAM,
653 Colman Building, Seattle, Washington,
Attorney for Appellant.

WILLIAM H. BOGLE,
609 Central Building, Seattle, Washington,

CARROLL B. GRAVES,
609 Central Building, Seattle, Washington,

FRED T. MERRITT,
609 Central Building, Seattle, Washington,

LAWRENCE BOGLE,
609 Central Building, Seattle, Washington,
Attorneys for Appellee.

STATEMENT.

Time of commencement of suit: March 29, 1912.

Names of Parties to suit:

Maine Northwestern Development Company, a corporation of the State of Maine, plaintiff and appellant.

Northwestern Commercial Company, a corporation of the State of Washington, defendant and appellee.

Dates of filing respective pleadings:

Amended Answer, filed March 17, 1913.

Motion to Strike From Amended Answer, filed February 24, 1913.

Opinion Denying Motion to Strike First Affirmative Defense, filed March 25, 1914.

Order Denying Motion to Strike Affirmative Defense, filed March 26, 1914.

Third Amended Answer, filed September 24, 1914.

Plaintiff's Demurrer to Third Amended Answer, filed December 31, 1914.

Opinion on the Demurrer to the Third Amended Answer, filed January 21, 1915.

Order Overruling Demurrer to Third Amended Answer, filed January 25, 1915.

Amended Complaint, filed July 31, 1915.

Amended Answer to Amended Complaint, filed September 20, 1915.

Motion to Strike Third Affirmative Defense of Answer, filed October 2, 1915.

Order Granting Motion to Strike Third Affirmative Defense to Amended Answer to Amended Complaint, filed October 7, 1915.

Reply, filed October 25, 1915.

Deposition:

Depositions of Edward A. Pierce and James E. Mamter taken upon notice, at Portland, Maine, April 12th and 13th, 1915;

Deposition of Edward A. Pierce, taken upon notice at New York, N. Y., April 19th, 1915;

Deposition of William H. Rust, taken by stipulation of date July 1, 1915.

Time of Trial: Nov. 23, 24, 26, 30, Dec. 1, 1915.

Verdict of Jury: Filed Dec. 1, 1915.

Final Judgment entered: Dec. 2, 1915.

Citation on Appeal: Date of issuance, March 8, 1916. Date of service, March 8, 1916. Date of filing, March 9, 1916.

In the United States District Court, for the Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

Amended Answer.

The defendant comes, and for its amended answer to the complaint herein, alleges:

I.

It denies that it has any knowledge or information sufficient to form a belief as to any of the allegations set forth in paragraphs numbered I, II, III, IX and X of said complaint.

II.

It denies each and every allegation contained in paragraphs numbered V and VI of said complaint.

III.

It denies that there is now due and owing from defendant to the plaintiff the sum of One Hundred Twenty-five Thousand Dollars ($125,000.00) together with interest thereon from March 12th, 1912, on any subscription to preferred stock of plaintiff, or on any other account whatever, and it denies that there is due and owing from defendant to plaintiff any sum whatever on any account.

And for a further and first affirmative defense to said complaint, defendant says:

I.

That at the time of the alleged subscription to the capital stock of said plaintiff, the John Rosene described in Exhibit "A" attached to the complaint herein, was the promoter and managing director of plaintiff, and was at the same time also president of this defendant. That the said Rosene as such promoter of the plaintiff company, and by virtue of certain contracts and agreements entered into between the promoters of said plaintiff company and the said John Rosene, and entered into between the said Rosene and the said plaintiff company, was personally interested in procuring subscriptions to the preferred stock of the plaintiff company. That the said John Rosene had no authority to make any subscription contract for or on behalf of this defendant for any of the shares of the

preferred stock of said plaintiff company, either as its President or otherwise, and that if any such subscription contract was signed by said Rosene purporting to be on behalf of this defendant company, it was without the knowledge or consent or authority of this defendant, and was made by him in furtherance of his personal interest in the plaintiff company, and to benefit himself as a promoter and contractor therewith, and at a time when he was its managing director—all of which was well known to said plaintiff at the time.

And for a further and second affirmative defense to said complaint, defendant says:

I.

That on or about the 20th day of September, 1907, the said plaintiff, acting by and through its managing Director, one John Rosene and its Treasurer and a Director, one Arthur A. Houseman, in consideration of the waiver and release by said defendant of any right to repudiate payments to plaintiff theretofore made aggregating One Hundred Twenty-five Thousand Dollars ($125,000.00) for shares of stock of said plaintiff, which payments had been so made without authority of said defendant, and the waiver by said defendant of any right to recover from plaintiff said sum of One Hundred Twenty-five Thousand Dollars ($125,000.00), or any part thereof, orally waived, released and discharged this defendant from any liability to said plaintiff for or on account of said alleged subscription contract pretended to have been made by the said Rosene on behalf of this defendant and pleaded in said complaint.

And for a further and third affirmative defense, defendant says:

I.

That in the certificate of organization of said plaintiff company and in its By-laws, its capital stock was fixed at the sum of Six Million Two Hundred Fifty Thousand Dollars ($6,250,000.00), divided into five hundred thousand (500,000) shares of the par value of Two Million Five Hundred Thousand Dollars ($2,500,000.00) of preferred stock, and seven hundred fifty thousand (750,000) shares of the par value of Three Million Seven Hundred Fifty Thousand Dollars ($3,750,000.00) of common stock. That the whole number of the said preferred shares of the capital stock of said plaintiff corporation has never been taken, issued or subscribed for; nor has the whole number of said common shares been either taken or subscribed for.

WHEREFORE, defendant prays that said complaint may be dismissed and that it may go hence without day and recover from the plaintiff its costs and reasonable disbursements herein.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

State of Washington, County of King.—ss.

C. A. McMasters, being duly sworn, states: That he is the Secretary of the Northwestern Commercial Company, a corporation, defendant in the above entitled cause; that he has read the foregoing answer, knows the contents thereof, and that the statements therein are true.

C. A. McMASTERS.

Sworn to and subscribed before me this 15th day of February, 1913.

(Notarial Seal.) F. F. MERRITT,
Notary Public in and for the State of Washington.
residing at Seattle.

Service of within Amended Answer this 15th day of Feby., 1913, and receipt of a copy thereof, admitted.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsed: Amended Answer: Filed in the U. S. District Court, Western Dist. of Washington, Mar. 17, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

Motion to Strike From Amended Answer.

Comes now the above named planitiff and moves to strike from defendant's amended answer herein as follows:

First: All of the first affirmative defense in said Amended Answer contained on the following grounds:

(1) That so much thereof as alleges want of knowledge, con-

sent or authority of defendant to make the subscription contract pleaded in the complaint, does not constitute new matter;

(2) That so much thereof as alleges that John Rosene was promoter and Managing Director of Plaintiff Company and at the same time President of this Defendant Company, and as such promoter, by virtue of certain contracts and agreements alleged in said affirmative defense, was personally interested in procuring subscriptions to the preferred stock of plaintiff company in furtherance of his personal interest and to benefit himself as promoter and contractor therewith, constitutes a defense cognizable, if at all, on the equity side of the Court;

Second: All of said first affirmative defense, excepting the words

> "That the said John Rosene had no authority to any subscription contract for or on behalf of this defendant for any of the shares of preferred stock of said plaintiff company, either as its President of otherwise, and if any such subscription contract was signed by said Rosene purporting to be on behalf of this defendant Company, it was without the knowledge or consent or authority of this defendant"

commencing in line 14 and ending in line 20, page 2 of said Answer; and further excepting the words

> "All of which was well known to said plaintiff at the time,"

commencing on line 23 and ending on line 24 of said page 2, on the following grounds:

That the allegations of said defense other than as excepted herein

(1) are irrelevant,

(2) constitute, if any, an equitable defense improperly merged and united with a legal defense.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Copy of within Motion received this 24th day of February, 1913.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Motion to strike from Amended Answer. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 24, 1913 Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington, Northern Division.

Maine Northwestern Development Company, Plaintiff,

v.

Northwestern Commercial Company, Defendant.

No. 2117.

Filed March 25, 1914.

On Motion to Strike an Affirmative Defense. Motion Denied.
William H. Gorham, for Plaintiff.
Bogle, Graves, Merritt & Bogle, for Defendant.
NETERER, District Judge.

This is an action upon an assessment levied upon subscribers to the stock of the plaintiff corporation. The plaintiff has moved to strike the following portion of the first affirmative defense of the defendant corporation:

"That at the time of the alleged subscription to the capital stock of said plaintiff, the said John Rosene described in Exhibit 'A' attached to the complaint herein, was the promoter and managing director of plaintiff, and was at the same time also president of this defendant. That the said Rosene as such promoter of the plaintiff company, and by virtue of certain contracts and agreements entered into between the promoters of said plaintiff company and the said John Rosene, and entered into between the said Rosene and the said plaintiff company, was prsonally interested in procuring subscriptions to the preferred stock of the plaintiff company . . . and was made by him in furtherance of his personal interest in the plaintiff company, and to benefit himself as a promoter and contractor therewith, and at a time when he was its managing director."

Plaintiff contends that the above constitutes an equitable defense and as such cannot be interposed in an action at law. Many authorities are cited by plaintiff to prove that the alleged action of the defendant's president was a breach of a fiduciary obligation, and thus that it amounts to fraud and cannot be pleaded as a defense in this action.

I cannot understand that the plaintiff seriously contends that fraud is always an equitable defense and may never be pleaded at law. The authorities cited are merely to the effect that a party when sued at law upon his own solemnly executed contract may not defend upon the ground of fraud unconnected with its execution. This holding is based upon the common law rule that a party to a

sealed instrument was bound by its recitals when it was introduced in a court of law, and could attack it for fraud only where such fraud was connected with the execution of the instrument in such a way as to render it not the deed of the party.

Hill v. Northern Pac. Ry. Co., 104 Fed. 754;
Pacific Mut. Life Ins. Co. v. Webb, 157 Fed. 155;
Levi. v. Mathews, 145 Fed. 152;
Hill v. Northern Pac. Ry. Co., 113 Fed. 914 (C. C. A.);
George v. Tate, 102 U. S. 564.

The proper procedure, according to these authorities, where the fraud relates merely to the consideration or inducement to contract is for the party defrauded to apply to a court of equity which might set aside the instrument upon such terms as might be deemed just, whereas a court of law would be limited to the validity or invalidity of the deed.

Hartshorn v. Day, 19 How. 211, 223.

But there is no such magic in the word "fraud" as to rob a court of law of jurisdiction, irrespective of the nature of the fraud charged. Where the fraud is of such a nature as to render the contract against public policy or illegal courts of law have universally refused to enforce it.

9 Cyc. 465.

To wave aside such a defense on the ground that it was a matter for equitable cognizance alone would be to make a court of law a potent agency in the accomplishment of illegal and unlawful designs.

Plaintiff's counsel occupies the unique position of asking the court to enforce a contract which he zealously contends is fraudulent; and to bring the defense pleaded by defendant within the meaning of the word fraud, he quotes good law and sound morals, neither of which are beyond the province of this court to recognize and enforce. From Twin-Lick Co. v. Marbury, 91 U. S. 587, he gleans the following:

"That a director of a joint stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts and may be set aside on slight grounds, is a doctrine founded on the soundest morality and which has received the clearest recognition in this court and in others."

He also incorporates in his brief the following from Wardell v. N. P. R. R. Co., 103 U. S. 651:

"It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent for another, whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict of interest and duty; and 'constituted as humanity is, in the majority of cases duty would be overborne in the struggle.' Marsh v Whitmore, 21 Wall, 183. The law therefore will always condemn the transaction of a party on his own behalf, when in respect to the matter concerned, he is the agent of others, and will release against them whenever their enforcement is seasonably resisted."

Plaintiff cites other authorities to bring such a defense as that here pleaded within the category of fraud. It is therefore unnecessary to discuss the effect of the facts pleaded upon the contract. While some respectable authority might be found to the effect that a contract made by the manager of one corporation with another corporation of which he is also manager is not wholly void and may be enforced where the party seeking its enforcement shows its fairness by clear and convincing proof (Geedes v. Anaconda Copper mining Co., 197 Fed. 860), yet where the party upon whom this burden is cast admits the fraud, it will hardly be contended that the contract should be enforced by a court of law or any other court.

2 Thompson on Corporations, Sec. 1242.

Of course such an admission is merely for the purposes of argument on the motion, but where the relationship pleaded is such as to throw upon the plaintiff as a matter of law the burden of showing absence of fraud, plaintiff's admission of fraud makes the defense which it moves to strike a perfect defense against its right of action.

Of agreements such as that here alleged, which tend to promote a breach of duty of persons who stand to others in a fiduciary relation, 9 Cyc. 474, says:

"While it is often said that such agreements are against public policy, because it is the policy of the law to secure fidelity in the discharge of their duties by all persons holding such positions of trust and confidence, yet it is more accurate to say that such agreements, tending to cause unfaithful conduct by fiduciaries, are illegal, because they are in effect agreements to wrong or defraud the persons whose interest the fiduciaries have in charge."

It would indeed be a harsh system of jurisprudence that would lend any of its courts to the enforcement of contracts in violation of fiduciary relations. While the distinction between law and equity is studiously preserved in our federal system, that distinction does not go to the extent of compelling one court to enforce agreements

which the other would abhor. Both are established to promote the well-being of society, and this may not be promoted by encouraging the violation of the most sacred duties known to the law.

Woodstock Iron Co. v. Extension Co., 129 U. S. 643;

West v. Camden, 136 U. S. 507.

It is unnecessary to discuss the other portion of the motion to strike.

The motion is denied.

JEREMIAH NETERER, Judge.

Opinion on denying motion to strike first affirmative defense. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 25, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States, for the Western District of Washington, Northern Division.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

No. 2117.

Order Denying Motion to Strike Affirmative Defense.

The above matter having come duly and regularly on to be heard before the Court, upon motion of said plaintiff to strike out certain portions of defendant's amended answer herein, and said motion having been duly submitted to the Court for consideration upon briefs of the respective parties herein, and the Court having duly considered said motion and the arguments of counsel thereon, and being fully advised in the premises, and having heretofore, and on March 25, 1914, filed its memorandum decision denying said motion:

Now Therefore, it is ordered that said motion be, and the same is hereby, in all things, denied. Exception noted.

Done in open court this 26th day of March, 1914.

JEREMIAH NETERER,
United States District Judge.

Indorsed: Order denying motion to strike affirmative defenses. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 26, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

No. 2117.

Third Amended Answer.

The defendant comes, and for its third amended answer to the amended complaint herein, alleges:

I.

It denies that it has any knowledge or information sufficient to form a belief as to any of the allegations set forth in paragraphs numbered I, II, III, IX and X of said complaint.

II.

It denies each and every allegation contained in paragraphs V and VI of said complaint.

III.

It denies that there is now due and owing from defendant to the plaintiff the sum of one hundred twenty-five thousand dollars ($125,000) together with interest thereon from March 12, 1912, on any subscription to preferred stock of plaintiff, or on any other account whatever, and it denies that there is due and owing from defendant to plaintiff any sum whatsoever on any account.

And for a further and first affirmative defense, defendant says:

I. That at the time of the alleged subscription to the capital stock of plaintiff company on behalf of this defendant by John Rosene, shown in "Exhibit A" attached to the complaint herein, said John Rosene had no authority to make any subscription to the capital stock of plaintiff company for or on behalf of this defendant, and such subscription, if made by said Rosene purporting to act on behalf of this defendant, was made without the knowledge or consent or authority of this defendant; that said Rosene, at the time said subscription is alleged in said complaint to have made, and prior thereto, was one of the promoters and managing directors of said plaintiff, and had entered into certain contracts with other promoters thereof and with said plaintiff whereby it was agreed, among other things, that said Rosene, together with said other pro-

moters, would organize the plaintiff corporation, and that said Rosene would sell and convey to said plaintiff—when organized — certain alleged mining claims and water rights, and for which he was to recieve, in part payment, the sum of two hundred and fifty thousand dollars; and was also to receive one million two hundred and fifty thousand dollars of the common stock of plaintiff for the benefit of himself and the said other promoters; that it was further understood and agreed, among other things, and as a part of said arrangement, that said Rosene would subscribe for preferred shares of stock of plaintiff on behalf of this defendant in said sum, and that the money realized on such subscription should and would be appropriated to the payment of said Rosene of said two hundred and fifty thousand dollars under said contract. That the said alleged subscription on behalf of this defendant, referred to in said complaint, was made by said Rosene pursuant to this agreement and understanding by him with said plaintiff and its promoters, and in furtherance thereof and of his own personal interests and those of said other promoters, and not otherwise. All of which was well known to plaintiff, and of all of which said facts this defendent was ignorant until after suit was commenced by plaintiff against this defendant on said pretended subscription.

2. That upon the organization of plaintiff company, said Rosene, pursuant to said agreement and understanding, did convey said mining claims of said plaintiff.

3. That said Rosene subsequently, without the knowledge or consent of this defendant, caused moneys of this defendant, aggregating one hundred and twenty-five thousand dollars, to be turned over to plaintiff on said alleged subscription, and said plaintiff turned said money over to said Rosene pursuant to the terms of the agreement and understanding hereintofore set out.

4. That immediately upon being informed that said alleged subscription had been made by the said Rosene purporting to act for this defendant, this defendant disaffirmed and repudiated the same and notified the plaintiff of its disaffirmance and repudiation thereof, and defendant has never at any time ratified, approved or adopted said subscription, but has at all times repudiated the same.

And for a second and further affirmative defense, defendant says:

1. It repeats all of the allegations contained in its first affirmative defense herein.

2. That on or about the 20th day of September, 1906, this defendant learned that said John Rosene, without its knowledge or consent, had turned over funds of this defendant to plaintiff

in the aggregate amounts of one hundred and twenty-five thousand dollars on said alleged subscription, which subscription had theretofore been disaffirmed by this defendant; that defendant, having a claim or right under the law and the facts, to recover from plaintiff said sum so received by it, the said plaintiff, acting by and through the said John Rosene, its managing director, and Henry W. Davis, its president, and Arthur A. Housman, its treasurer and a director, they being duly authorized to act for plaintiff in the premises, agreed and stipulated, orally, to waive and release, and did waive, release and discharge this defendant from any liability to plaintiff and from any further claim of any kind or nature, by plaintiff against defendant for or on account of said alleged subscription agreement, in consideration of the waiver and release by defendant of its right or claim of right to recover from plaintiff the said sum of one hundred and twenty-five thousand dollars so turned over to it from or out of the assets of this defendant as above stated.

3. That said agreement of settlement, mutual release and accord was accepted by plaintiff and acquiesced in for a period of more than three years, and no claim was made or asserted by it against this defendant of any kind whatever until the commencement of its first action against defendant in 1910.

That it had previously repudiated and disaffirmed said subscription agreement, and has constantly since said last named date repudiated and disaffirmed same and disclaimed any liability thereunder.

And for a further affirmative defense, defendant says:

The right of action of plaintiff herein did not accrue within six years prior to the commencement of this action.

WHEREFORE defendant prays that said complaint may be dismissed, and that it may go hence without day and recover from the plaintiff the said sum of one hundred and twenty-five thousand ($125,000), with interest from September 20, 1906, and its costs and disbursements herein.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

STATE OF WASHINGTON, County of King.

R. W. BAXTER, being duly sworn, states:

That he is the President of the NORTHWESTERN COMMERCIAL COMPANY, a corporation, defendant in the above entitled action; that he has read the foregoing third amended answer,

knows the contents thereof, and that the statements therein are true.

R. W. BAXTER.

SUBSCRIBED and sworn to before me this 23rd day of September, A. D., 1914.

F. T. MERRITT,
Notary Public in and for the State of Washington, residing at Seattle.

Service of within Amended Answer this 21st day of Sept., 1914, and receipt of a copy thereof, admitted.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsed: Third Amended Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Sept. 24, 1914, Frank L. Crosby, Clerk.

By E. M. L., Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

v.

Northwestern Commercial Company, a corporation, Defendant.

Plaintiff's Demurrer to Third Amended Answer.

Comes now the plaintiff, and reserving its reply to the fourth affirmative defense of the third amended answer herein, demurs to said third amended answer as follows:

I.

Plaintiff demurs to the first affirmative defense contained in said third amended answer on the grounds:

1st. That the new matter therein contained does not constitute a defense:

2nd. That the new matter therein contained is matter of purely equitable cognizance not properly pleadable in an action at law.

II.

Plaintiff demurs to the second affirmative defense contained in said third amended answer on the grounds:

1st. That the new matter therein contained does not constitute a defense;

2nd. That the new matter therein contained is matter of purely equitable cognizance not properly pleadable in an action at law.

III.

Plaintiff demurs to so much of the third affirmative defense contained in said third amended answer as was not stricken by the order of court entered herein on October 19th, 1914, on the ground:

That the new matter therein contained does not constitute a defense.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsed: Plaintiff's Demurrer to Third Amended Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 31, 1914. Frank L. Crosby, Clerk.

By E. M. L., Deputy.

United States District Court, Western District of Washington
Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

v.

Northwestern Commercial Co., a corporation, Defendant.

Filed January 21, 1916.

On Demurrer to Third Amended Answer.

Demurrer overruled.

WILLIAM H. GORHAM,
For Plaintiff.

BOGLE, GRAVES, MERRITT & BOGLE,
For Defendant.

NETERER, District Judge.

An order may be presented overruling the demurrer to each affirmative defense, and in this connection I desire to refer to the language employed in the order denying a motion to strike parts of the affirmative defense, filed October 16, 1914, in which it was said that the "matter being merely explanatory of the denial set forth in this defense and not being prejudicial." I refer to this language for the reason that it is apparent from the argument before the bar and the language employed that some of the matters set forth

in this answer in the several causes of defense, may prove to be purely matters of equitable defense, and if so, would have to be excluded upon the trial of the law action.

JEREMIAH NETERER,
Judge.

Indorsed: Opinion on the Demurrer to the Third Amended Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 21, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company a corporation, Defendant.

Order overruling Demurrer to Third Amended Answer.

This cause having come on duly and regularly to be heard before the Court upon plaintiff's demurrer to the first, second and third affirmative defenses set forth in defendant's third amended answer herein,

The Court having duly considered said demurrer and the arguments of counsel thereon and the briefs of the respective parties thereon.

And the Court being fully advised in the premises and having heretofore on January 21, 1915, filed its memorandum decision overruling said demurrer,

Now Therefore, it is ordered, that said demurrer to the first and second affirmative defenses of the third amended answer be and the same is hereby in all things overruled; to which ruling plaintiff excepts and its exception is allowed;

And it is further ordered, that the demurrer to so much of the third affirmative defense in said third amended answer as was not stricken by order of the Court entered herein on October 19th, 1914, be and the same is hereby sustained. Exception noted.

Dated, Seattle, January 25th, 1915.

JEREMIAH NETERER,
Judge.

Order on Demurrer to Third Amended Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 25, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

Amended Complaint.

Plaintiff complains and alleges:

I.

That during all of the times herein mentioned the plaintiff was and now is a corporation duly organized and existing under the laws of the State of Maine and authorized to do and doing business in the State of Maine and elsewhere, from the date of its incorporation, March 17, 1906, until January 10, 1912, under the corporation name of Northwestern Development Company, and thereafter under the corporate name of Maine Northwestern Development Company, its corporate name being changed on said last named date in the manner prescribed by the laws of the State of Maine.

II.

That at all times since January 19, 1912, plaintiff has been and now is authorized under the laws of the State of Washington to do business within the State of Washington, and that it has paid its annual license last due, for the year ending June 30, 1912, to the State of Washington.

III.

That plaintiff was duly incorporated as aforesaid expressly to carry on, among others, the following lawful business:

"To purchase or otherwise acquire from John Rosene one hundred and seventy one certain mining claims and certain water rights in Alaska, and as payment therefor to issue and deliver $3,750,000 par value of full paid and non-assessable shares in the common stock of the corporation and to pay the sum of $245,000 in cash, on the terms of an agreement to be authorized by its board of directors;" with a capital stock of $6,250,000, divided into two classes to-wit, one class $2,500,000 preferred stock divided into 500,000 shares of the par value of $5 each; the other class $3,750,000 common stock divided into 750,000 shares of the par value of $5 each.

IV.

That on, to-wit, March 20, 1906, plaintiff purchased from said Rosene said 171 mining claims and water rights in Alaska for the

sum of $3,995,000, and as payment therefor on March 30, 1906, issued and delivered to the order of said Rosene $3,750,000 par value of full paid and non-assessable shares in its common stock and thereafter paid the sum of $245,000 in cash, on the terms of an agreement authorized by its board of directors, which said mining claims and water rights were, in the judgment of plaintiff's directors, necessary for its business, and which said sum of $3,995,000 was, in the honest and bona fide judgment of plaintiff's directors, the fair and reasonable value of said mining claims and water rights.

V.

That said purchase by plaintiff from said Rosene of said mining claims and water rights as aforesaid was authorized by a resolution duly adopted by the unanimous vote of its board of directors at a meeting of said board duly called and held on March 20, 1906, at which all of the directors of plaintiff were present and participating; and that said directors, together with said Rosene, were on said last named day the owners and holders of all of the capital stock of plaintiff then issued and outstanding; and that said purchase was thereafter ratified, approved and confirmed by the unanimous vote of all of the stockholders of plaintiff at a meeting of said stockholders duly called and held on March 29, 1906 at Portland, Maine, at which meeting last aforesaid all of the capital stock of plaintiff then issued and outstanding was represented and voted.

VI.

That on March 21, 1906, said purchase was completed by the delivery by said Rosene to plaintiff of an indenture duly executed and acknowledged, between said Rosene and plaintiff, conveying to plaintiff said mining claims and water rights.

VII.

That thereafter and prior to April 4, 1906, of said full paid common stock so issued as aforesaid, 499,989 shares were by said Rosene deposited with A. A. Housman & Company for delivery to the order of the several subscribers to the preferred shares of capital stock of plaintiff, at the rate of one share of common for every $5 paid on account of their subscriptions respectively, and ever since said last named date up to May 1, 1909, said A. A. Housman & Company have been ready, able and willing, and ever since said May 1, 1909, the plaintiff, as assignee of said A. A. Housman & Company of said common shares last aforesaid solely for the purpose of delivery as aforesaid, has been ready, able and willing to deliver common shares of plaintiff's capital stock

to the order of the several subscribers to the preferred shares of plaintiff's capital stock at the rate aforesaid.

VIII.

That plaintiff, at all times since said 4th day of April, 1906, has been and now is ready, able and willing to issue and deliver to defendant its preferred stock to the amount of defendant's subscription thereto, upon payment of said subscription.

IX.

That during all of the times herein mentioned, defendant was and now is a corporation organized and existing under the laws of the State of Washington.

X.

That subsequent to the incorporation of plaintiff from time to time subscriptions were made to said preferred stock under a form of subscription agreement common to all subscribing thereto; and of said $2,500,000 preferred stock, the defendant, on, to-wit, April 4th 1906, by its subscription agreement in form common to all subscribers, for value received, subscribed to $250,000 thereof and thereby agreed to pay therefor as follows:

20% of said subscription on signing;

10% of said subscription on July 15, 1906;

and the residue thereof from time to time as called for by the directors of plaintiff on thirty days' notice, provided that not over 50% of said subscription should be payable during the year 1906; a copy of which said subscription agreement so delivered by defendant is hereto annexed, marked Exhibit "A," hereby referred to and by such reference made a part hereof.

XI.

That between, to-wit, the 4th day of April 1906 and the 17th day of October 1906, both inclusive, defendant paid plaintiff on account of its said subscription to said preferred stock the sum of one hundred and twenty-five thousand ($125,000) dollars, which amount was credited defendant on its said subscription as it was received from time to time.

XII.

That between the 4th day of April 1906 and the 9th day of November 1906, upon payment by defendant to plaintiff of said $125,000, as aforesaid, plaintiff issued to defendant and defendant accepted therefor 25,000 shares of said preferred stock.

XIII.

That between the 4th day of April 1906 and the 9th day of November 1906, common shares of plaintiff's capital stock

deposited with A. A. Housman & Company as aforesaid, were delivered to the order of defendant as a subscriber to said preferred shares, at the rate of one share of common stock for every $5 paid by defendant on account of its said subscription to preferred stock; and said preferred and common stock were so issued and delivered to the order of and accepted by defendant, from time to time, for payments made, as they were made, by defendant to plaintiff on its said subscription.

XIV.

That on, to-wit, the 15th day of January 1912, plaintiff, by resolution duly adopted at an adjourned meeting of a special meeting of its stockholders duly called and held on the 10th day of January 1912, and by resolution of its board of directors at a special meeting of said board duly called and held on the 22nd day of January 1912, duly levied and called for assessments on the residue of the subscriptions to its preferred capital stock in said subscription agreement referred to, payable on or before the 12th day of March 1912, to the Treasurer of plaintiff in care of, either A. A. Housman & Company, at 20 Broad Street, New York City, or Union Savings & Trust Company, Seattle, Washington, as follows:

Assessment No. 1, of 20% on the preferred shares of said capital stock and on the subscriptions thereto;

Assessment No. 2, of 50% on the preferred shares of said capital stock and on the subscriptions thereto; and thereby directed that thirty days' written notice thereof be given subscribers to said preferred shares, and further directed and provided that so much of each subscription to said preferred shares in excess of 30% thereof agreed to be paid as therein provided and not exceeding 50% thereof, as had theretofor been paid to plaintiff by subscribers thereto, be credited upon said assessment No. 1, against said preferred shares so subscribed and upon which said excess had been so paid; and that so much of each subscription to said preferred shares in excess of 50% thereof, agreed to be paid as in said subscription agreement provided, as had theretofore been paid to plaintiff by subscribers thereto, be credited upon said assessment No. 2 against the preferred shares so subscribed and upon which such amount in excess of 50% had been so paid.

XV.

Thereafter, at a special meeting of the stockholders of plaintiff duly called and held on the 1st day of March 1912, at the office of plaintiff in the City of Portland, State of Maine, the acts of its stockholders at the special meeting of its stockholders on January 15, 1912 aforesaid, and the acts of its board of directors,

in adopting the resolution of January 22, 1912, as aforesaid, in levying and calling for said assessments, directing thirty days' notice thereof to be given, fixing the time when, and place where, and the person to whom the same should be payable, and directing so much of said subscriptions to said preferred stock in excess of 30% as had theretofore been paid be credited upon said assessments aforesaid, were duly ratified and confirmed.

XVI.

That on, to-wit, the 8th day of February 1912, plaintiff gave defendant thirty days' written notice of said calls and assessments, of the time when, place where, and person to whom payments thereof were payable, and of the credit on assessment No. 1, on defendant's subscription of a sum equal to the sum of said assessment No. 1 of defendant's subscription theretofore paid by defendant on said subscription, all as provided in said resolution last aforesaid.

XVII.

That defendant failed and refused and does still fail and refuse to pay assessment No. 2 on its said subscription to said preferred stock; and there is now due and owing from defendant to plaintiff thereon the sum of $125,000 together with interest thereon from March 12, 1912.

XVIII.

That on March 13th 1913, plaintiff by resolution of its board of directors duly authorized and empowered its President to bring suit or suits against subscribers to its preferred capital stock to collect delinquent assessments thereon.

Wherefore, plaintiff prays judgment against defendant in the sum of one hundred and twenty five thousand ($125,000) dollars, together with interest thereon from March 12, 1912 until paid, and for its costs and disbursements herein.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Exhibit "A"

Northwestern Development Company
(Incorporated under the laws of Maine).

Preferred stock $2,500,000
Common stock 3,750,000

The preferred stock is to be entitled to dividends aggregating 100 per ecnt. before any payment of dividends on common stock. Thereafter dividends will be paid at the same rate on both classes of stock. On liquidation, the preferred stock shall be entitled to payment at par, and thereafter the remainder of assets shall be

divided among the holders of the common stock. Also, first mortgage 6 per cent. 15-year bonds of the Seward Peninsula Railway (to an amount not exceeding $1,000,000 out of an authorized issue not exceeding $3,000,000) shall be receivable at par for dividends on the preferred stock, after the railway company shall have earned during two consecutive years 15 per cent. for each year on the actual cost of construction, after paying operating and other expenses (except interest) and taxes.

For value received, the undersigned subscribers, severally and each for himself and not for any other, agrees with the Northwestern Development Company and with each other, to take and pay for the number of preferred shares set opposite their names respectively at par, and agree to pay therefor as follows:

20 per cent. of each subscription on signing;

10 per cent. of each subscription on July 15, 1906; and the residue from time to time as called by the Directors of the said corporation or thirty days' notice, provided that not over 50 per cent. of each subscription shall be payable during the year 1906.

Payments shall be made to A. A. Housman, Treasurer, at 20 Broad Street, New York, and full paid shares up to the amounts paid in shall be delivered therefor.

In case any subscriber shall fail to pay any installment according to the terms hereof, the corporation may cancel his subscription with such penalties, not exceeding forfeiture of the amount therefore paid on such subscription, as it may determine and re-allot the same.

It is understood that common shares of the corporation have been deposited with A. A. Housman & Company, and will be delivered to the order of the several subscribers at the rate of one share for every $5 paid on account of their subscription respectively.

Name of subscriber	Address	Preferred Stock subscribed for
Northwestern Commercial Co., per John Rosene, Pres.	Seattle	$250,000

United States of America, Western District of Washington

ss

T. A. Davies, being first duly sworn, on oath says: That he is the president of the plaintiff in the above entitled action; that

he has heard the foregoing amended complaint read, knows the contents thereof, and believes the same to be true.

T. A. Davies.

Subscribed and sworn to before me this 30th day of July, A. D. 1915.

A. E. Ritzwaller.

Notary Public in and for the State of Washington, residing at Seattle, Washington.

(SEAL)

Copy of within Amended Complaint received this 30th day of July, 1915.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 31, 1915. Frank L. Crosby, Clerk. By E. M. L. Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs

Northwestern Commercial Company, a corporation, Defendant.

Amended answer to amended complaint.

The defendant comes and for answer to the last amended complaint of plaintiff herein, states, alleges and denies as follows:

I.

Defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations set forth in paragraphs numbered I, II, V, VI, VII, VIII, XIV, XV, and XVIII of said amended complaint.

II.

Defendant denies each and every allegation contained in

paragraphs numbered IV, X, XI, XII and XIII of said amended complaint.

III.

Defendant admits that plaintiff was organized with a capital stock of Six Million Two Hundred Fifty Thousand Dollars ($6,250,000.), divided into two classes, to-with: One class, Two Million Five Hundred Thousand Dollars ($2,500,000.), preferred stock, divided into five hundred thousand shares, of the par value of Five Dollars ($5.00) each; the other class, Three Million Seven Hundred Fifty Thousand Dollars ($3,750,000.), common stock, divided into seven hundred fifty thousand (750,000) shares, of the par value of Five Dollars ($5.00) each. It denies that it has any knowledge or information sufficient to form a belief as to any of the other allegations contained in paragraph numbered III of said amended complaint.

IV.

Defendant admits the allegations contained in paragraph numbered IX of said amended complaint.

V.

Defendant admits that on or about the 8th day of February, 1912, this defendant received a written notice from plaintiff of certain alleged calls and assessments alleged to have been made by said plaintiff, requiring payment by this defendant of the sum of One Hundred Twenty-five Thousand Dollars ($125,000.) alleged to be payable under said alleged subscription, but denies each and every other allegation contained in paragraph numbered XVI of said amended complaint.

VI.

Defendant admits that it failed and refused, and does still fail and refuse to pay the assessment referred to in paragraph XVII of said amended complaint, or any other assessment made by plaintiff against it, but denies each and every other allegation contained in said paragraph numbered XVII.

AND FOR A FURTHER AND FIRST AFFIRMATIVE DEFENSE, defendant says:

I.

That the John Rosene mentioned in said amended complaint at the time said subscription is alleged in said complaint to have been made by him on behalf of this defendant, and prior thereto, was one of the promoters and managing directors of said plaintiff, and had entered into certain contracts with certain other promoters thereof and with said plaintiff whereby it was agreed, among other things, that said Rosene, together with said other promoters, would organize the plaintiff corporation; that said John

Rosene and certain other persons were the owners of certain mining claims and water rights in Alaska, of little value, and which they were desirous of selling, and it was agreed, among other things, between said Rosene and said other owners of said mining property, and said other promoters of plaintiff corporation, that when said corporation was organized, the title to said mining property would be conveyed to said Rosene by the other owners thereof, and that said Rosene would thereupon convey said property to said plaintiff corporation, and would receive therefor, in full payment for said property, the sum of two hundred and forty-five thousand dollars ($245,000.); that one million two hundred fifty thousand dollars ($1,250,000.) par value of the capital stock of plaintiff corporation, of the class known as common stock, should be issued, ostensibly as part payment for said property, but in reality as a bonus and gift to said Rosene and said other promoters of plaintiff corporation; that it was further understood and agreed, among other things, and as a part of said arrangement, that said Rosene would provide the money to be paid for said mining property by subscribing for preferred shares of stock of plaintiff on behalf of this defendant to the amount of two hundred fifty thousand dollars ($250,000.), and that the money realized on such subscription should and would be appropriated to the payment to said Rosene of said two hundred and forty-five thousand dollars ($245,000) under said contract. That the said alleged subscription on behalf of this defendant, referred to in said complaint, was made by said Rosene and accepted by said plaintiff pursuant to this agreement and understanding by him with said plaintiff and its promoters, and in furtherance thereof and of his own personal interests and those of said other promoters, and not otherwise. That said plaintiff corporation, after its organization and its officers and directors, had full knowledge of the facts, understandings and agreements hereinabove set out, and became a party thereto; that the said subscription so attempted to be made by said Rosene on behalf of this defendant was accepted by plaintiff with knowledge of all the facts herein set out, and pursuant to said agreements the said common stock herein mentioned was issued by plaintiff to said promoters; that this defendant did not authorize nor approve said subscription so attempted to be made on its behalf and was ignorant of the secret understandings, agreements and interests of said Rosene herein set out until during the years 1910 or 1911. That at a meeting of the Trustees, in April, 1906, at which said Rosene was present when said defendant was first notified that said Rosene had made said alleged subscription, said Trustees immediately disapproved thereof, of which disapproval verbal notice was soon thereafter given to the president and treasurer of plaintiff by said Rosene and by other of defendant's

trustees, but defendant is not able at this time to give the names of such other trustees so giving this notice; and in September, 1906, when defendant learned that $125,000 of its moneys and assets had without its authority been applied by said Rosene or under his direction as payment on said subscription, its said trustees again disapproved said subscription, and at that time, to-wit, September 5th, 1906, said Trustees authorized a subscription to be made on its behalf to the preferred stock of plaintiff in the sum of $125,000, and no more, it being intended and understood by said Trustees that the moneys and assets of defendant previously given to plaintiff by said Rosene or under his direction, as hereinabove stated, in the sum of $125,000, were to be applied in payment of the subscription so authorized by the trustees of defendant,—of all of which verbal notice was given by defendant through said Rosene and its other trustees, soon thereafter, to the president and treasurer of plaintiff, and the said moneys were so applied by them. That in April, 1907, the Board of Trustees of defendant, by resolution then passed, again repudiated and disapproved the alleged subscription made by said Rosene, and written notice thereof was given immediately thereafter by J. D. Thenholme, secretary of defendant, to plaintiff, by letter addressed to plaintiff at its then post-office address.

That no claim against this defendant under said alleged subscription by said Rosene was made or asserted by plaintiff, subsequent to September, 1906, until in August, 1910, when defendant received notice of certain assessments or calls alleged to have been made by plaintiff at that time against defendant, based upon said alleged subscription by Rosene, and a demand for payment thereof; that defendant, by and through its attorneys, Bogle & Spooner, by letter to plaintiff on August 19, 1910, again notified plaintiff that said alleged subscription was unauthorized and had been and was repudiated by defendant and denied any indebtedness whatever to plaintiff thereon.

II.

That upon the organization of plaintiff company, said Rosene, pursuant to said agreement and understanding, did convey said mining claims to said plaintiff.

III.

That said Rosene subsequently, without the knowledge or consent of this defendant, caused moneys of this defendant, aggregating One Hundred Twenty-five Thousand Dollars ($125,000) to be turned over to plaintiff on said alleged subscription, and said plaintiff turned said money, or a large part thereof, over to said Rosene pursuant to the terms of the agreement and understanding hereinbefore set out.

AND FOR A SECOND AND FURTHER AFFIRMATIVE DEFENSE, defendant says:

I.

It repeats all of the allegations contained in its first affirmative defense herein.

II.

That on or about the 5th day of September, 1906, this defendant learned that said John Rosene, without its knowledge or consent, had turned over funds of this defendant to plaintiff in the aggregate amount of One Hundred and Twenty-five Thousand Dollars ($125,000) on said alleged subscription, which subscription had theretofore been disaffirmed by this defendant as stated in the first affirmative defense, to which reference is here made; that defendant, having a claim or right under the law and the facts, to recover from plaintiff said sum so received by it, the said plaintiff, acting by and through the said John Rosene, its managing director, and Henry C. Davis, its president, and Arthur A. Hausman, its treasurer and a director, they being duly authorized to act for plaintiff in the premises, and said Rosene being authorized to act therein for defendant to secure a release of any further claim of liability against defendant on said pretended subscription, agreed and stipulated, orally, to waive and release, and did waive, release and discharge this defendant from any liability to plaintiff and from any further claim of any kind or nature, by planitiff against defendant for or on account of said alleged subscription agreement, in consideration of the oral waiver and release by defendant acting through said Rosene, of its right or claim of right to recover from plaintiff the said sum of One Hundred and Twenty-five Thousand Dollars ($125,000) so turned over to it from or out of the assets of this defendant, as above stated.

III.

That said agreement of settlement, mutual release and accord was accepted by plaintiff by its officers above named and acquiesced in for a period of more than three (3) years, and no claim was made or asserted by it against this defendant of any kind whatever until in August, 1910.

AND FOR A FURTHER AND FOURTH AFFIRMATIVE DEFENSE, defendant says:

The right of action of plaintiff herein did not accrue within six (6) years prior to the commencement of this action.

AND FOR A FIFTH AFFIRMATIVE DEFENSE, defendant says:

I.

That said plaintiff was promoted and organized by one John

Rosene, A. A. Hauseman and L. H. French, and their associates, under the Corporation Laws of Maine, being the Revised Statutes of Maine of 1904; that Section 50 of Chapter 47 of said laws provides:

"Any corporation may purchase mines, manufactories, and other property necessary for its business, and the stock of any company or companies owning, mining, manufacturing or producing materials or other property necessary for the business, and issue stock to the amount of the value thereof in payment therefor, and may likewise issue stock for services rendered to such corporation and the stock so issued shall be full paid stock and not liable to any further call or payment thereon, and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased, or services rendered, shall be conclusive."

That Section 87 thereof also provides:

"The capital stock subscribed for any corporation is declared to be and stands for the security of all creditors thereof; and no payment upon any subscription to or agreement for the capital stock of any corporation, shall be deemed a payment within the purview of this chapter, unless bona fide made in cash, or in some other matter or thing at a bona fide and fair valuation thereof."

II.

That the said promoters, in order to secure for themselves and others the common stock of said corporation, as a bonus and gift, and without the payment of any money to said corporation therefor, or the receipt by said corporation of any property, services or other thing of value as a consideration for the issuance of said common stock, and contrary to the laws and public policy of said state, entered into a scheme or device to that end as follows:

The said Rosene and French, and other associates of theirs, held or owned the certain mining claims and water rights in said amended complaint mentioned, which they agreed, with said other promoters, to sell to said corporation, when organized, for the sum or price of Two Hundred Forty-five Thousand Dollars ($245,000). It was arranged and agreed by said owners and by said promoters and by the officers and directors of plaintiff (when organized), that said mining property and water rights should be conveyed to said corporation, and that the ostensible consideration to be stated in the documents and resolutions would be Two Hundred Forty-five Dollars ($245), in cash, and Three Million Seven Hundred Fifty Thousand dollars ($3,750,000), par value of the common stock, being all of the authorized common stock of plaintiff, although the real consideration would be Two Hundred Forty-five Thousand Dollars

($245,000) in money; that the cash consideration, to-wit, Two Hundred Forty-five Thousand Dollars ($245,000) should be paid by plaintiff to the said Rosene for the owners or holders of said mining property and water rights; that the Three Million Seven Hundred Fifty Thousand Dollars ($3,750,000), par value, of said common stock should be issued to A. A. Hauseman & Co. by plaintiff, and that they should deliver One Million Two Hundred Fifty Thousand Dollars ($1,250,000) to said John Rosene, L. H. French and A. A. Hauseman, as a bonus or gift to them as promoters of said plaintiff; and that the remainder of said common stock, to-wit, two million five hundred thousand dollars ($2,500,000) par value, should be delivered by said A. A. Hauseman & Co. to subscribers to the preferred stock, from time to time as such subscriptions were obtained and paid.

That said scheme or device was well known to the officers and directors of plaintiff, and was by their aid and co-operation carried out, and the common stock referred to in said amended complaint which plaintiff avers it is ready and offers to deliver to this defendant, is a part of the Two Million Five Hundred Thousand Dollars ($2,500,000) common stock so illegally issued and delivered to A. A. Hauseman & Co. pursuant to the scheme and devise hereinabove set out.

III.

That said common stock was issued by plaintiff to said A. A. Hauseman & Co. and was never issued or delivered to the vendors of said property.

IV.

The said mining property and water rights were of little, if any, real value, and were not considered by the vendors nor by plaintiff nor its officers and directors as having either an actual or speculative value in excess of the Two Hundred Forty-five Thousand Dollars ($245,000) cash paid therefor; and was not at any time valued by said plaintiff or by its directors in good faith, in the exercise of their honest judgment, at any sum in excess of Two Hundred Forty-five Thousand Dollars ($245,000).

V.

That the directors of plaintiff, at the time of the issuance or the authorizing of the issuance of said stock and the purchase of said property, had been selected and were controlled by said Rosene, French and Hauseman, and acted in their interest and under their control, and had no knowledge whatever of said property or its value, and if they pretended to make any valuation of said property, they acted wholly under the direction and control and in the interest of said promoters in so doing, and exercised no inde-

pendent judgment and did not in fact make any bona fide valuation of said property.

VI.

That the plaintiff corporation has never had under its ownership or control, so as to be able to issue or cause to be issued to the defendant, in performance of the subscription contract, any shares of its common stock for which the par value has at any time been paid in money or in labor done, or property received, either of an actual value equal to not less than par, or at a valuation not less than par made in good faith by the directors of the plaintiff, but that all the common stock proposed and offered in said amended complaint to be issued or delivered to this defendant under said subscription has been or will be illegally issued under and pursuant to the fraudulent scheme and device hereinabove set out, and for no consideration whatever to said plaintiff or else for alleged labor or property at a valuation by the plaintiff's directors not fixed in good faith and known by plaintiff and its directors to be excessive and beyond any fair valuation of such labor or property.

WHEREFORE, defendant prays that said complaint may be dismissed, and that it may go hence without day and recover from the plaintiff its costs and disbursements herein.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

State of Washington, County of King, ss.

R. W. Baxter, being duly sworn, states: That he is the president of the Northwestern Commercial Company, a corporation, defendant in the above entitled action; that he has read the foregoing amended answer, knows the contents thereof, and that the statements therein are true.

R. W. BAXTER.

Subscribed and sworn to before me this 18th day of September, A. D. 1915.

CARROLL A. GORDON,
Notary Public in and for the State of Washington,
residing at Seattle.

Service of within Answer this 18th day of Sept., 1915, and receipt of copy thereof, admitted.

W. H. GORHAM,
Attorney for Plaintiff.

Indorsed: Amended Answer to Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Sept. 20, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, Plaintiff,

v.

Northwestern Commercial Company, Defendant.

Motion to strike third affirmative defense of answer.

Comes now the above named plaintiff and moves the Court to strike the third affirmative defense of the defendant's amended answer to the amended complaint herein on the grounds:

(1) That the same is irrelevant;

(2) That the same is inconsistent with the plea of **non est factum** contained in the general denials of said answer.

(3) That the same is inconsistent with the allegations of repudiation contained in the first and second affirmative defenses of said answer.

WILLIAM H. GORHAM,
Attorney for plaintiff.

Copy of within Motion received this 1st day of October., 1915.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Motion to strike third affirmative defense to amended answer to amended complaint. Filed in the U. S. District Court, Western Distr. of Washington, Northern Division, Oct. 2, 1915. Frank L. Crosby, Clerk. By E.M. L. Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

Order granting motion to strike affirmative defense to amended answer to amended complaint.

This cause coming on regularly for hearing on the Motion of

plaintiff to strike the third affirmative defense to the amended answer to amended complaint,

The Court having heard argument of counsel for the respective parties and being fully advised in the premises,

It is ordered that said Motion be granted;

To which order defendant excepts and its exception is allowed.

Done in open court this 7th day of October, 1915.

JEREMIAH NETERER,
Judge.

O. K.—Graves.

Indorsed: Order granting motion to strike 3rd affirmative defense to amended answer to amended complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 7, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwetern Commercial Company, a corporation, Defendant.

REPLY.

Comes now the plaintiff and, replying to defendant's amended answer to the amended complaint herein, alleges:

As to the **first** affirmative defense thereof:

I.

That it admits the allegations of said first affirmative defense that said John Rosene, at the time of said subscription and prior thereto, was one of the promotors and a director of said plaintiff; that said Rosene was present at a meeting of defendant's trustees in April 1906; that at said meeting defendant was notified that said Rosene had made said subscription; that defendant's trustees, on September 5th 1906, authorized a subscription to be made on its behalf to the preferred stock of plaintiff in sum of $25,000; and it denies generally each and every other allegation contained in said first affirmative defense.

II.

That a code of by-laws, including by-laws No. 25, for its government was duly adopted by plaintiff on March 17, 1906, in

accordance with chapter 47 of the Revised Statutes of Maine 1904, and of acts amendatory thereof and additional thereto, a copy of which said by-law No. 25, marked Exhibit B is hereto annexed, hereby referred to and by such reference made a part hereof, which, at all times in plaintiff's amended complaint mentioned, was in full force and effect.

III.

That a form of stock certificate for the preferred capital stock of plaintiff was duly adopted by plaintiff's board of directors on March 21, 1906, a copy of which form marked Exhibit C is hereto annexed, hereby referred to and by such reference made a part hereof, which form, at all times in plaintiff's amended complaint mentioned, was in full force and effect.

IV.

That on, to-wit, April 21, 1906, defendant paid plaintiff on account of said subscription agreement the sum of $50,000 receiving therefor from plaintiff certificate of stock No. 37, Series G, for 10,000 shares of preferred capital stock of plaintiff, in the form of stock certificate aforesaid, which said 10,000 shares of stock were carried as an item of investment of defendant on the general books of defendant at the close of its fiscal year, April 30, 1906, and was included in the item "capital assets" of defendant in its annual report for the fiscal year ending April 30, 1906, issued by defendant to its stockholders.

That defendant made further payments to plaintiff on account of said subscription agreement and received therefor from plaintiff certificates of shares of the preferred capital stock of plaintiff, in the form of stock certificate aforesaid, as follows, to-wit:

On July 15, 1906, the sum of $25,000 receiving therefor certificates of stock, Nos. 1 to 5, inclusive, Series F, for 1,000 each, aggregating 5,000 shares of the preferred capital stock of plaintiff;

On September 6, 1906, the sum of $25,000 receiving therefor certificates Nos. 6 to 10, inclusive, Series F, for 1,000 shares each, aggregating 5,000 shares of the preferred capital stock of plaintiff;

On September 25, 1906, the sum of $25,000, receiving therefor certificates of stock Nos. 11 to 15, inclusive, Series F, for 1,000 shares each, aggregating 5,000 shares of the preferred capital stock of plaintiff;

All of which 15,000 shares of stock last aforesaid were, between July 15, 1906 and November 9, 1906, issued by plaintiff and accepted by defendant, and were, together with said 10,000 shares of stock, certificate No. 37, Series G, carried as an item of investment of defendant on the general books of defendant at the close of its fiscal year, April 30, 1907, and were included in the item; "Capital Assets, stock in other Companies;" in its statement showing its

financial condition at the close of its fiscal year ending April 30, 1907, issued by defendant to its stockholders.

VI.

That defendant had notice, by its acceptance of said certificates of stock as aforesaid, as to its rights as a shareholder of plaintiff and to what provisions and terms contained and specified in the charter and by-laws of plaintiff, defendant thereby assented to, as in said certificates of stock expressly provided; and defendant was thereby put on inquiry as to, and had notice of, plaintiff's acquiring by purchase from said Rosene said mining claims and water rights for $245,000 cash and $3,750,000 in common stock of plaintiff, as aforesaid.

VII.

That at the meeting of trustees in April 1906, as alleged in the 1st paragraph of said first affirmative defense, defendant was notified that said Rosene had made said subscription; which said meeting of defendant's trustees was held at Seattle, Washington, on April 12, 1906;

But no action was then taken by defendant or by its trustees on said subscription agreement and action on the same was, at the adjournment of said meeting, left open by defendant and its trustees for the future consideration and action by said trustees; and the subject of said subscription agreement was not again taken up by defendant or its trustees until the next meeting of said trustees, which was held at Seattle, Washington, on September 5, 1906, at which said subscription again came up for their consideration and action and was fully discussed and defendant's trustees then and there attempted to ratify said subscription agreement to the extent of the sum of $125,000, by adopting a resolution authorizing its president to subscribe for stock of plaintiff for defendant in said sum of $125,000; and thereupon, at the meeting last aforesaid, a further resolution was adopted by said trustees authorizing and directing defendant's president to sell and dispose of stock held by defendant in plaintiff company down to $50,000; but no further or other action was taken by defendant's trustees at said time respecting said subscription agreement;

That defendant at no time held any stock of plaintiff company other than that acquired under said subscription agreement as in said amended complaint alleged.

VII.

That on, to-wit, January 23rd 1907, defendant was represented in a stockholders' meeting of planitiff's stockholders and participated in the transactions of plaintiff's business therein, as a stockholder of plaintiff holding said 25,000 shares of preferred stock of

plantiff, by voting as such stockholder affirmatively upon a resolution which was adopted at said meeting of January 23rd 1907, which resolution ratified all the acts, votes and proceeding of every description theretofore done, passed and taken by the incorporators, stockholders, officers and directors of plaintiff, including the issuance of its common stock as aforesaid.

IX.

That notwithstanding all of the matters and things in this reply hereinbefore alleged and set forth, neither defendant not its trustees ever disaffirmed or repudiated said subscription agreement until April 10, 1907, when at a meeting of defendant's trustees held at Seattle, Washington, a resolution was adopted affirming defendant's subscription to the capital stock of plaintiff in the sum of $125,000 and no more and directing its attorney to prepare the necessary notice to be sent by its secretary to plaintiff notifying plaintiff that no subscription for the capital stock of plaintiff was ever authorized in any sum whatever except for $125,000;

That at a meeting of the executive committee of defendants trustees, held at Seattle, Washington, on September 18th 1907, a resolution was adopted that defendant's proxy be forwarded to one S. W. Eccles to represent defendant at a special meeting of plaintiff's stockholders to be held at plaintiff's office in the City of Portland, State of Maine, on October 3rd 1907, said proxy to be given with power of substitution and a further resolution was adopted at said meeting directing defendant's treasurer to have defendant's stock in plaintiff company re-issued in defendant's name.

X.

That on, to-wit, October 5, 1908, by letter from plaintiff's president, addressed and delivered to defendant at Seattle, Washington, enclosing and calling defendant's attention to a circular letter, of date April 9, 1908, from the secretary of a committee of preferred stockholders of plaintiff, accompanied by a report of date April 7, 1908, of plaintiff's legal advisers and a financial statement of accountants therein enclosed, the fact that plaintiff had acquired by purchase from said Rosene said mining claims and water rights, as contemplated by its charter and by-laws for $245,000 cash and $3,750,000 par value full paid non assessable shares of the common stock of plaintiff, was made known to defendant; and that thereafter and some time during the month of October 1908, the exact day being unknown to plaintiff, at Seattle, Washington, defendant's president personally acknowledged receipt of said letter and its enclosures to plaintiff's president, at which time last aforesaid, the original capitalization of plaintiff, the purchase by it from said Rosene of certain mining claims and water rights for $245,000

financial condition at the close of its fiscal year ending April 30, 1907, issued by defendant to its stockholders.

VI.

That defendant had notice, by its acceptance of said certificates of stock as aforesaid, as to its rights as a shareholder of plaintiff and to what provisions and terms contained and specified in the charter and by-laws of plaintiff, defendant thereby assented to, as in said certificates of stock expressly provided; and defendant was thereby put on inquiry as to, and had notice of, plaintiff's acquiring by purchase from said Rosene said mining claims and water rights for $245,000 cash and $3,750,000 in common stock of plaintiff, as aforesaid.

VII.

That at the meeting of trustees in April 1906, as alleged in the 1st paragraph of said first affirmative defense, defendant was notified that said Rosene had made said subscription; which said meeting of defendant's trustees was held at Seattle, Washington, on April 12, 1906;

But no action was then taken by defendant or by its trustees on said subscription agreement and action on the same was, at the adjournment of said meeting, left open by defendant and its trustees for the future consideration and action by said trustees; and the subject of said subscription agreement was not again taken up by defendant or its trustees until the next meeting of said trustees, which was held at Seattle, Washington, on September 5, 1906, at which said subscription again came up for their consideration and action and was fully discussed and defendant's trustees then and there attempted to ratify said subscription agreement to the extent of the sum of $125,000, by adopting a resolution authorizing its president to subscribe for stock of plaintiff for defendant in said sum of $125,000; and thereupon, at the meeting last aforesaid, a further resolution was adopted by said trustees authorizing and directing defendant's president to sell and dispose of stock held by defendant in plaintiff company down to $50,000; but no further or other action was taken by defendant's trustees at said time respecting said subscription agreement;

That defendant at no time held any stock of plaintiff company other than that acquired under said subscription agreement as in said amended complaint alleged.

VII.

That on, to-wit, January 23rd 1907, defendant was represented in a stockholders' meeting of planitiff's stockholders and participated in the transactions of plaintiff's business therein, as a stockholder of plaintiff holding said 25,000 shares of preferred stock of

plantiff, by voting as such stockholder affirmatively upon a resolution which was adopted at said meeting of January 23rd 1907, which resolution ratified all the acts, votes and proceeding of every description theretofore done, passed and taken by the incorporators, stockholders, officers and directors of plaintiff, including the issuance of its common stock as aforesaid.

IX.

That notwithstanding all of the matters and things in this reply hereinbefore alleged and set forth, neither defendant not its trustees ever disaffirmed or repudiated said subscription agreement until April 10, 1907, when at a meeting of defendant's trustees held at Seattle, Washington, a resolution was adopted affirming defendant's subscription to the capital stock of plaintiff in the sum of $125,000 and no more and directing its attorney to prepare the necessary notice to be sent by its secretary to plaintiff notifying plaintiff that no subscription for the capital stock of plaintiff was ever authorized in any sum whatever except for $125,000;

That at a meeting of the executive committee of defendants trustees, held at Seattle, Washington, on September 18th 1907, a resolution was adopted that defendant's proxy be forwarded to one S. W. Eccles to represent defendant at a special meeting of plaintiff's stockholders to be held at plaintiff's office in the City of Portland, State of Maine, on October 3rd 1907, said proxy to be given with power of substitution and a further resolution was adopted at said meeting directing defendant's treasurer to have defendant's stock in plaintiff company re-issued in defendant's name.

X.

That on, to-wit, October 5, 1908, by letter from plaintiff's president, addressed and delivered to defendant at Seattle, Washington, enclosing and calling defendant's attention to a circular letter, of date April 9, 1908, from the secretary of a committee of preferred stockholders of plaintiff, accompanied by a report of date April 7, 1908, of plaintiff's legal advisers and a financial statement of accountants therein enclosed, the fact that plaintiff had acquired by purchase from said Rosene said mining claims and water rights, as contemplated by its charter and by-laws for $245,000 cash and $3,750,000 par value full paid non assessable shares of the common stock of plaintiff, was made known to defendant; and that thereafter and some time during the month of October 1908, the exact day being unknown to plaintiff, at Seattle, Washington, defendant's president personally acknowledged receipt of said letter and its enclosures to plaintiff's president, at which time last aforesaid, the original capitalization of plaintiff, the purchase by it from said Rosene of certain mining claims and water rights for $245,000

and $3,750,000 in common stock of plaintiff full paid and non-assessable, was discussed between said presidents.

That more than three years next succeeding elapsed since the delivery to and acceptance by defendant of said 25,000 shares of preferred stock of plaintiff as aforesaid, the voting of said stock by defendant at said stockholders' meeting on January 23rd 1907, the receipt by defendant of said letter of October 8, 1908, with enclosures and the discussion between said presidents of the purchase of said mining property by plaintiff as aforesaid, during which time defendant has not disaffirmed or repudiated said subscription agreement on account of said purchase or the payment and delivery to said Rosene of the consideration therefor or at all.

XI.

That by reason of the premises defendant is stopped from disaffirming or repudiating or claiming a disaffirmance or repudiation of said subscripton agreement.

As to the **second** affirmative defense thereof:

I.

That as to the first paragraph of said second affirmative defense, it here repeats each and every allegation contained in its reply to the first affirmative defense of defendant's amended answer to the amended complaint herein.

II.

That as to paragraphs two and three of said second affirmative defense, it denies generally each and every allegation therein contained.

As to the **fourth** affirmative defense thereof:

I.

That it denies generally each and every allegation therein contained.

As to the **fifth** affirmative defense thereof:

I.

It denies generally each and every allegation contained therein.

II.

That a code of by-laws, including by-law No. 25, for its government was duly adopted by plaintiff on March 17th 1906, in accordance with chapter 47 of the Revised Statutes of Maine, 1904, and of acts amendatory thereof and additional thereto, a copy of which said by-law No. 25, marked Exhibit B is hereto annexed, hereby referred to and by such reference made a part hereof, which, at all

times in plaintiff's complaint mentioned, was in full force and effect.

III.

That a form of stock certificate for the common capital stock of plaintiff was duly adopted by plaintiff's board of directors on March 21st 1906, a copy of which form marked Exhibit C1 is hereto annexed, hereby referred to and by such reference made a part hereof, which form was at all times in plaintiff's amended complaint in full force and effect.

IV.

That defendant, by its acceptance of common stock of plaintiff company as alleged in paragraph XIII of the amended complaint herein, had notice as to its rights as a shareholder of plaintiff and as to what provisions and terms contained and specified in plaintiff's charter and by-laws defendant thereby assented to; and defendant was thereby put on inquiry as to and had notice of plaintiff's articles of incorporation, its by-laws, its capitalization, its purchase of said mining claims and water rights from said Rosene for $3,995,000; cash $245,000 and full paid common stock of plaintiff $3,750,000, and of the deposit of 499,989 shares of said common stock for delivery to the several subscribers of plaintiff's preferred stock at the rate of one share of common for every $5 paid on account of subscriptions to preferred stock, all as alleged in paragraphs III, IV, V, VI and VII of said amended complaint.

V.

That on, to-wit, January 23rd 1907, defendant was represented at a stockholders' meeting of plaintiff's stockholders held in the City of Portland, State of Maine, and participated in the transactions of plaintiff's business therein, as a shareholder of plaintiff holding the common stock of plaintiff delivered to and accepted by it as alleged in paragraph XIII of plaintiff's amended complaint herein, by voting as such stockholder affirmatively upon a resolution which was adopted at said meeting of January 23rd 1907, which resolution ratified all the acts, votes and proceedings of every description theretofore done, passed and taken by the incorporators, stockholders, officers and directors of plaintiff, including the issuance of its common stock as aforesaid.

VI.

That more than three years next succeeding have elapsed since said common stock was delivered to and accepted by defendant as aforesaid and since said January 23rd 1907, during which period defendant has not disaffirmed or repudiated said subscription a-

greement on account of the issue by plaintiff of its common stock as afore said or at all.

VII.

That by reason of the premises defendant is estopped from disaffirming or repudiating or claiming a disaffirmance or repudiation of said subscription agreement on account of the issue by plaintiff of its common stock as aforesaid.

Wherefore, plaintiff prays for judgment as in its amended complaint herein.

WILLIAM H. GORHAM.
Attorney for Plaintiff.

Exhibit B.

"Issue of capital stock in payment for certain properties.

25. Without in way by reference, inference or otherwise restricting or limiting the business or purposes of the corporaton as specified in its certificate of organization or the powers of the board of directors as set out in these by-laws, the corporation may purchase or otherwise acquire from John Rosene 171 certain placer mining claims and certain water rights in Alaska and may issue and deliver in payment therefor $3,750,000 par value of full paid and non-assessable shares in the common stock of the corporation, and may pay the sum of $245,000 in cash on the terms of an agreement between the said Rosene and the Company to be hereafter authorized by the board of directors. All certificates issued for shares in the capital stock of the corporation shall contain an express reference to these by laws and the holder of any such shares by accepting any such certificates either before or after the purchase of the said mining claims and water rights and the transfer thereof to the corporation, thereby consents to the same and agrees that all the said shares so issued in payment for such mining claims and water rights shall be or were when issued fully paid by the sale and transfer thereof and not liable to any further calls or assessments whatsoever. And notice is hereby expressly and for all time given that all shares in the capital stock of this corporation are issued and accepted upon the express understanding that there shall be no liability on the part of the incorporators, organizers and promotors of this corporation or any of them on the ground that they stand in any fiduciary relation thereto or on the ground that they have fixed the price payable by this corporation for the said mining claims and water rights or in the circumstances that this corporation has no independant board of directors, and that there shall be no liability on the part of the incorporators, organizers and promotors of this corporation or any of them arising from or in any way growing out of the sale and transfer to it of the said mining claims and water rights. And no contract or arrangement made or entered

into on behalf of this corporation with any other corporation or with any officer or director of this corporation, or any firm, association or corporation of which such officer or director is a member, director, officer or stockholder shall be rendered void or voidable by reason of the fact that the board of directors or officers of such other corporation are wholly or partially the same as the board of directors and officers of this corporation or by reason of the fact that such officer or director of this corporation or such firm, association or corporation is interested in such contract. And no such officer or director shall be liable to account to the corporation for any benefits which he may derive from his being so interested, provided that he discloses to the board of directors or to the executive committee the nature of his interest. And it is generally understood and agreed that every present and future officer and stockholder of this corporation shall and does assent to the terms and conditions and circumstances on or in which the said mining claims and water rights have been purchased and acquired by this corporation and the shares of stock of this corporation have been or are to be issued as aforesaid.

EXHIBIT C.

Capital Stock, $6,250,000; Preferred Stock, $2,500,000; Common Stock, $3,750,000.

No..... .....Shares

Northwestern Development Company, incorporated under the Laws of the State of Maine.

PREFERRED.

THIS IS TO CERTIFY that .....
is the holder of .....
full paid and non-assessable shares in the preferred stock of the Northwestern Development Company of the par value of $5 each transferrable only on the books of the said Company according to its by-laws.

As more specifically provided in the by-laws of the Company the said holder is entitled to preferential cumulative dividends until dividends aggregating $2,500,000 shall have been paid on the entire issue of 500,000 shares of preferred stock of which the shares represented hereby are a part and is further entitled upon the liquidation or dissolution of the Company to preference to the extent of the par value of the shares represented hereby. After preferential dividends aggregating $2,500,000 shall have been paid on the shares of preferred stock as aforesaid the holders of the shares of preferred and common stock shall participate alike in all future dividends.

Reference is hereby expressly made to the charter and by-laws of the Company for a more particular description of the rights

of the holder of the shares represented by this certificate and the said holder by accepting this certificate assents to all the provisions and terms contained and specified in the said charter and by-laws.

This certificate shall not be valid for any purpose unless countersigned by the duly authorized Transfer Agent of the Company.

Witness the common seal of the Northwestern Development Company and the signatures of its president or a vice-president and its treasurer or an assistant treasurer this.....day of .....19...

.....Treasurer.

.....President.

Countersigned:

A, A. Housman & Co., Transfer Agents.

By.....

For Value received the undersigned hereby sells, assigns and transfers unto .... shares in the preferred stock of the Northwestern Development Company represented by the within certificate.

Date .....

Witness.....

.....

NOTE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

The Northwestern Development Company is directed by its by-laws to transfer upon its books the shares of preferred stock represented hereby to the assignee named in a written assignment thereof upon surrender of such assignment and of this certificate. No power of attorney is necessary to authorize the registration of such transfer.

EXHIBIT C1

Capital Stock, $6,250,000; Preferred Stock, $2,500,000; Common Stock, $3,750,000.

No..... .....Shares

Northwestern Development Company, incorporated under the Laws of the State of Maine.

COMMON.

THIS IS TO CERTIFY that .....

is the holder of .....

full paid and non-assessable shares in the common stock of the Northwestern Development Company of the par value of $5 each

transferrable only on the books of the said Company according to its by-laws.

As more specifically provided in the by-laws of the Company dividends on the shares represented hereby and payments in respect of such shares upon the liquidation or dissolution of the Company are postponed respectively to the dividends and payments in respect of the shares of preferred stock and the holder of this certificate by accepting the same assents to such preferences.

Reference is hereby expressly made to the charter and by-laws of the Company for a more particular description of the rights of the holder of the shares represented by this certificate and the said holder by accepting this certificate assents to all the provisions and terms contained and specified in the said charter and by-laws.

This certificate shall not be valid for any purpose unless countersigned by the duly authorized Transfer Agent of the Company.

Witness the common seal of the Northwestern Development Company and the signatures of its president or a vice-president and its treasurer or an assistant treasurer this.....day of .....19...

.....Treasurer.

.....President.

Countersigned:

A, A. Housman & Co., Transfer Agents.

By.....

For Value Received the undersigned hereby sells, assigns and transfers unto .... shares in the common stock of the Northwestern Development Company represented by the within certificate.

Date .....

Witness .....

.....

NOTE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

The Northwestern Development Company is directed by its by-laws to transfer upon its books the shares of common stock represented hereby to the assignee named in a written assignment thereof upon surrender of such assignment and of this certificate. No power of attorney is necessary to authorize the registration of such transfer.

United States of America, Western District of Washington, ss.

T. A. Davies being first duly sworn, on oath says: That he is the president of the plaintiff corporation in the above entitled ac-

tion; that he has heard the foregoing reply read, knows the contents thereof, and believes the same to be true.

T. A. DAVIES.

Subscribed and sworn to before me this 11th day of October, A. D. 1915.

FRED LLEWELLYN,
Notary Public in and for the State of Washington, residing at Seattle, Washington.

(SEAL)

Copy of within Reply received this 19th day of Oct., 1915.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Reply. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 25, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

STATEMENT OF THE TESTIMONY INTRODUCED ON THE TRIAL.

This cause coming on regularly for hearing on the merits on November 23, 1915 and thereafter, upon continuance, on November 24, 26, 30, and December 1, 1915, before the Honorable Jeremiah Neterer, Judge of the above entitled court, sitting with a jury duly empanelled and sworn, the plaintiff appearing by its attorney, William H. Gorham, and the defendant appearing by its attorneys, Messrs. Bogle, Graves, Merritt & Bogle, the following proceedings were had and testimony taken, each of the witnesses called being first duly sworn to tell the truth, the whole truth and nothing but the truth, to-wit:

Deposition of EDWARD A. PIERCE, a witness for plaintiff, taken at Portland, Maine, April 12, 1915, offered to plaintiff and received and read in evidence, as follows:

That his name was Edward A. Pierce; age forty; occupation, stock broker; residence, Short Hills, New Jersey; place of business, 20 Broad Street, New York; lived in the Eastern States; had no present intention of visiting or residing within one hundred miles of

the City of Seattle, State of Washington, within twelve months; knew the plaintiff; was formerly a director of plaintiff under its former name of Northwestern Development Company; first elected a director early in 1906; remained a director two or three years; attended nearly all if not all of the meetings of the Board, held at New York, as a director; held the office of Assistant Treasurer of the Company; first elected to that office some time in 1906; held that office until 1908; knew George Henderson of New York City, who was Secretary of plaintiff, from 1906 until his death; that Henderson has been dead for over one year; that Henderson was first elected Secretary of plaintiff in 1906; had occasion to become acquainted with him; had daily, almost daily experience with reference to identifying signatures, having large responsibility as a stock broker, owing to value of stock certificates, foreign drafts and so forth, in determning genuineness of signatures; was very well acquainted with signature of George Henderson, Secretary of plaintiff.

(Witness upon being shown paper produced and marked Exhibit D1 for identification, which includes pages 41-46 inclusive, testified:)

That he had seen those papers; that signature "George Henderson" over the title "Temporary Secretary" at top of page 42 was signature of George Henderson, former Secretary of plaintiff; witness was present at that meetng of which Exhibit D1 is a record, in his capacity as a director; that signature "George Henderson" over title "Secretary" on page 56 of Exhibit D1 was the signature of George Henderson, formerly Secretary of plaintiff; that signature "George Henderson" over the title "Secretary" at top of page 60 of paper produced marked Exhibit D2 for identification, consisting of pages 57-60 inclusive, was signature of George Henderson, formerly Secretary of plaintiff;

(Witness' attention being called to recital on page 57 of Exhibit D2 as follows:

The Secretary presented to the meeting forms of preferred and common stock certificates, and upon motion duly made and seconded, the same were approved and ordered to be spread on the records as follows, see page 67; and witness' attention being called to page 67 of paper marked Exhibit D2, forms of stock certificate, preferred and common stock, testified:)

That he recognied that form of stock certificate as form adopted by recital on page 57, and that form was the form respectively of the common and preferred stock of plaintiff.

No cross examination.

No one appearing for defendant.

Deposition of JAMES E. MANTER, a witness for plaintiff, taken at Portland, Maine, April 13, 1915, offered by plaintiff and received and read in evidence as follows:

That his name was James E. Manter; age forty-nine; residence South Portland, Maine; occupation, Manager of Corporation Trust Company; did not contemplate residing within or visiting the State of Washington, within the next twelve months; was acquainted with plaintiff, formerly Northwestern Development Company;

(Witness being shown paper marked for identification "D3" testified:)

That was the signature of the Secretary of State, Mr. Bunker, preceding the title "Secretary of State;" had seen that signature practically every day since he took office in January of this year; had correspondence with him; had occasion to consult him subsequent to such correspondence and had verified and confirmed such correspondence; had seen him sign, so that he could tell his signature as Secretary of State for State of Maine;

Had in his custody and possession the original minutes of meetings of signers of articles of agreement under corporaton laws of Maine, for the plaintiff of date March 17, 1906, minutes of succeeding meetings of stockholders of plaintiff of March 19, 1906, subsequent meeting of board of directors of plaintiff of March 19, 1906. minutes of subsequent meeting of stockholders of March 29, 1906, the minutes of the subsequent meeting of stockholders of January 23, 1907, the minutes of the subsequent stockholders' meeting of January 10, 1912, stockholders' meeting January 15, 1912, and stockholders' meeting of March 1, 1912 (which witness then produced, "pages not numbered.")

(Paper produced and marked Exhibit D4 for identification and signatures on fifth page shown witness, who testified:)

That he knew those signatures; they were the signatures of the parties signing them; that he was present at time they signed them, and that constituted original Articles of Agreement in the original organization of plaintiff.

(Witness being shown the record of first meeting of signers of the Articles of Agreement consisting of six pages, produced and marked Exhibit D5, for identification, testified):

That he knew signature on second page "James E. Manter, Justice of the Peace;" that it was his signature, upon the occasion of taking the oath of Millard W. Baldwin as Clerk of plaintiff; That the signature on page 6 "Millard W. Baldwin" over the title "Clerk" is signature of Mr. Baldwin, with which he was familiar from January 1903 until latter part of 1908; and that he saw him

(Baldwin) sign that; (referring to the signatures at the bottom of page 6) that he saw those respective persons sign that;

Was present at first meeting of signers of Articles of Agreement of plaintiff; that at that meeting, the name of the Corporation was decided upon, the amount of the capital stock, and the signers were authorized to execute the certificate of organization and have the same approved, recorded and filed; they also adopted a set of by-laws; that a record was made of the transactions at that meeting; that that record was in the original record book, which had already identified as Exhibit D5; that the by-laws are next following the meeting of the signers;

(Witness shown paper marked for identification Exhibit D6, testified:)

That paper was the by-laws adopted by signers of Articles of Agreement, at the meeting of signers of said articles, concerning which he had just testified; that the words in long-hand writing "as amended January 15, 1912," on first page of Exhibit D6, shows the meeting of stockholders at which that particular section was amended; those are the original by-laws; those are the cross notations.

(Witness being shown paper entitled "First meeting of board of directors of Northwestern Development Company" produced and marked Exhibit D7, for identification, of date March 19, 1906, consisting of three pages, testified:)

That signature of James Manter, Justice of Peace, on second page was his own, signed upon taking the oath of Jas. H. Hernan, as secretary of plaintiff; that the signature at the bottom of the third page, Exhibit D7, preceding the title "Secretary" was the signature of Mr. Hernan, which witness saw him sign; was present during entire meeting of the first meeting of the board of directors on March 19, 1906; knew what transpired there; that officers were elected and treasurer's bond presented and approved; and that a record was made of the transactions of that meeting; that Exhibit D7 was identified as that record;

(Witness being shown paper entitled "Northwestern Development Company, Record of First Annual meeting" marked Exhibit D8, for identification, consisting of four pages, and shows signatures of Eaton, Hernan, Ricker, Crummett and Brophy, on second page, testified:)

Those are the signatures of the persons who were subscribers to the capital stock, that he saw them sign; that signature "James E. Manter" on fourth page of this Exhibit was his own; that signature "Millard W. Baldwin" as Clerk, was that of Mr. Baldwin, and signature at foot of page of Eaton, Hernan, Ricker, Crummett and Brophy, were signatures of the stockholders of the plaintiff; that

he was present during entire first annual meeting of the stockholders of plaintiff held on March 19, 1906; that at that meeting the original subscribers to the capital stock transferred subscription stock to qualify the gentlemen who were finally elected permanent directors of plaintiff at that meeting, the parties in interest; that a record of the transactions of that meeting was made, which witness identified as Exhibit D8;

(Witness being shown paper entitled "Northwestern Development Company, Special Meeting of Stockholders, Portland, Maine, March 29, 1906," marked Exhibit D9, for identification, consisting of four pages, and the signature on fourth page "Millard W. Baldwin" over title "Clerk," testified:)

That was signature of Millard W. Baldwin, which witness saw him sign; that he (witness) was present during entire meeting of stockholders of plaintiff on that date; that what transpired at that meeting will be shown by the record which witness identified as Exhibit D9.:

"Witness being shown paper entitled "Northwestern Development Company, Notice of Special Meeting of Stockholders" produced and marked Exhibit D10, for identification, consisting of four pages, and signature "James E. Manter" on the third page, testified:)

That was his own; and signature "Millard W. Baldwin" over title of "Clerk" was signature of Mr. Baldwin, which witness saw him sign. That he (witness) was present during entire meeting of the special meeting of stockholders of plaintiff on January 23, 1907, as proxy for A. A. Housman & Company; proxy in printed form signed by A. A. Housman & Company, duly witnessed, whose signature he knew, which proxy was not now in existence, having been voluntarily destroyed in November 1914, and that owing to the congested condition of their vaults and cellars, it was necessary for them to destroy document files belonging to all their corporations, up to January 1, 1908; that the similar records of other corporations whose business he was handling in a similar manner to this—every corporation—about 1600 in all—were likewise destroyed.

That at special meeting of stockholders of plaintiff January 23, 1907, he was present during entire time of meeting, the transactions of which will be shown by the record which witness identified as Exhibit D10; that he voted the shares at that meeting which that record recites that A. A. Housman & Company were represented by James E. Manter's proxy in the number of 768,149 shares; that the record is a true record of the transactions of that meeting; could not say that at any time subsequent to that meeting the issue to witness of that proxy by A. A. Housman & Company, was ratified and confirmed in any manner by correspondence or otherwise; was

familiar with signature of A. A. Housman & Company; the proxy was never repudiated by A. A. Housman & Company.

(Witness being shown paper produced and marked Exhibit D11, for identification, consisting of four pages and the signature "James E. Manter" over the title "Clerk" on the fourth page, testified:)

That was his own signature; That he was present at that annual meeting of stockholders during the entire time, as Clerk of plaintiff and also representing certain stockholders by proxy, as shown by the record, proxies in writing;

(Witness being shown paper produced and marked Exhibit D12, for identification, testified:)

That was Housman's proxy for that meeting; and that what transpired at that stockholders' meeting would be shown by the records which had already been identified as Exhibit D11, including the change of name of corporation.

(Witness shown paper produced marked Exhibit D13, for identification, testified:)

That was the certificate of the Secretary as to mailing notice of annual meeting of stockholders of January 10, 1912, and list of stockholders, original records from his files.

(Witness being shown signature "A. A. Housman & Co." on Exhibit D12, for identification, testified:)

That he knew signature of A. A. Housman & Co., stockholders in plaintiff at that time and that was their signature.

That it was on faith and credit of certificate of Secretary and list of stockholders that he voted the proxy as shown by Exhibit D12.

(Witness being shown minutes of stockholders' meeting of January 15, 1912, of plaintiff, produced by witness and marked Exhibit D14 for identification, testified:)

That signature "James E. Manter" over the title "Clerk" on the last page was his own;

That he was pesent during the entire meeting, on that date, of plaintiff, in the capacity of Clerk and as representing certain stockholders by proxy as shown by the record, same proxies which he had had at the previous meeting of which this was the adjourned meeting; that what transpired at that adjourned meeting of January 15, 1912, would be shown by the record already marked for identification as Exhibit D14.

(Witness being shown paper produced and marked Exhibit D15 for identification, record of adjourned meeting of

Annual Meeting of Stockholders, of date January 27, 1912, consisting of three pages, testified:)

That the signature "James E. Manter" on third page was his own;

That he was present during the entire meeting on that day of plaintiff in capacity of Clerk and also as representing certain stockholders as shown on the record, same proxies presented at the original meeting of which this was an adjournment.

That what transpired at that meeting will be shown by the record which had already been marked as Exhibit D. 15.

(Witness being shown paper entitled "Record of Special meeting of stockholders, March 1st, 1912" produced and marked Exhibit D. 16, for identification, consisting of sixteen pages, testified:)

That signature "James E. Manter" on last page over the title "Clerk" was his own. That he was present at that meeting in capacity as Clerk and also as representing certain stockholders by proxy in writing.

(Witness being shown paper marked Exhibit D. 17 for identification, testified:)

That signature "A. A. Housman & Company" on that paper was signature of A. A. Housman & Company, stockholders of plaintiff;

That on the strength of that signature and that proxy so signed, he voted as shown by record of that special meeting of stockholders of March 1st, 1912, of plaintiff.

(Witness being shown paper consisting of: affidavit of Secretary, Exhibit A. showing call, Exhibit B., list of stockholders, and a telegram addresses to James E. Manter, signed "A. H. Kellogg, Secy. Maine Northwestern Development Company, Seal Maine Northwestern Development Company, Inc. 1916. Maine" dated Seattle, Feb. 29, 1912, marked Exhibit D18. for identification, testified:)

That he received them in due course of mail and by wire; that on the proxy which A. A. Housman & Company forwarded to them and on the strength of the certified copy sent us by the Secretary, Mr. Kellogg, Exhibits D. 17 and D. 18, he (witness) voted by proxy at the meeting of the stockholders of the plaintiff on March 1st, 1912:

That, with reference to the transaction of the signers of the original articles of agreement of plaintiff, to the meeting of the signers of the original articles of agreement, the meetings of the stockholders and meetings of the board of directors so far as they were held at Portland, Maine, and so far as their record had been

disclosed in these papers which had been introduced for identification as exhibits, those records record all of the transactions of those several meetings. That he was present at all of the meetings to which his attention has been called and concerning which he has testified, and during the entire meetings and that he was familiar with the transactions as they took place and with the record as made.

(Witness being shown paper marked Exhibit, for identification, D. 5, on the fourth page, headed, "Subscription Agreement," testified:)

That the names "James J. Hernan, W. F. Conant, Geo. C. Ricker, J. L. Brophy, and Clarence E. Eaton" were the signatures of the people who subscribed for the subscription stock—that being the original subscription agreement and those their respective signatures which he saw them sign.

(Exhibits D. 1 to D. 18, for identification, offered by plaintiff and received in evidence and marked Exhibits D. 1 to D. 18, respectively.)

That there has been no amendment to by-law 25, a part of Exhibit D 6, as originally adopted, at any time subsequent to the adoption of that by-law.

No cross-examination.

No one appearing for defendant.

Deposition of EDWIN A. PIERCE, a witness for plaintiff, taken at New York City, New York, April 19, 1915, offered by plaintiff and received and read in evidence, as follows:

That his name was Edward A. Pierce; (age, occupation, resident, place of business were as given in his deposition taken at Portland, Maine, April 12, 1915).

Knew plaintiff; was formerly a director of plaintiff; first elected a director in 1906, remained a director two or three years; attended as a director nearly all, if not all, the meetings of the board held in New York; was Assistant Treasurer, elected to that office summer of 1906; continued to hold that office about two years; acquainted with A. A. Housman & Company of 20 Broad Street, New York; was associated with them in business in capacity of manager throughout 1906; knew A. A. Housman, who died August, 1907, during his lifetime; A. A. Housman was Treasurer of plaintiff in 1906 and 1907; his brother, Clarence Housman was elected to succeed him as Treasurer of plaintiff; Clarence Housman, Treasurer of plaintiff until summer of 1908; he was succeeded by William Ferguson, a resident of New York City; knew Henry C. Davis, former President of plaintiff, who died De-

cember, 1910; knew George Henderson of New York City, former Secretary of plaintiff, who died about two years ago.

(Witness being shown letter produced and marked for identification Exhibit E. 1; testified:)

That he first saw letter, Exhibit E. 1, in office of A. A. Housman & Company April, 1906, since which time it has, up to present time, been in that office; condition which letter now is in with respect to its condition when witness first saw it, unchanged.

(Witness being shown first paragraph, the closing of the first paragraph, the language—"I herewith enclose subscription for $250,000 for the Northwestern Commercial Company," and being also shown paper produced and marked for identification Exhibit E. 2, testified:)

Paper, Exhibit E. 2, was received with letter of April 4th, marked Exhibit E. 1;

That he knew John Rosene of Seattle, formerly managing director of plaintiff; knew his signature; that name, "John Rosene" in the signature "Northwestern Commercial Co. per John Rosene, Pres." was John Rosene's signature; was familiar with printed form of subscription to preferred stock of plaintiff during year 1906; that Exhibit E. 2, is a copy of the form of subscription of plaintiff in use during 1906; no other form used at that time so far as he knew;

(Witness being shown telegram produced and marked for identification, Exhibit E. 3, testified:)

That he first saw that telegram on or about April 3d or 4th, 1906, in the office of A. A. Housman & Company, in whose office it has been since that time up to the present time; that its present condition with respect to the condition when witness first saw it, was unchanged;

That there was common stock transferred to A. A. Housman & Company in spring of 1906, for their delivery in accordance with the understanding contained in the last paragraph of subscription agreement Exhibit E. 2; in the neighborhood of five hundred thousand shares; that of that common stock there was a share of common stock issued for each share of preferred stock delivered on subscription, issued in the majority of instances to the subscriber of the preferred stock; in other instances partly to subscribers and partly to brokers; it was issued as a bonus under the agreement; that there was, between March, 1906, and December, 1907, on hand with A. A. Housman & Co. a sufficient quantity of the common stock so delivered to them to comply with this requirement.

(Witness being shown paper produced and marked for identification Exhibit E. 4, testified:)

That the signature at the bottom of the second page was signature of A. A. Housman & Co., in his handwriting; that the occasion of writing that letter was that it advised plaintiff of a shipment to them of that Company's records; that the shipments were made as indicated by that letter.

(Witness being shown paper marked for identification Exhibit E. 5, testified:)

That he had seen it before; that the name "A. A. Housman per E. A. P." was his signature; that statements in Exhibit E. 5, were correct at time statement Exhibit E. 5 was made and dated; that Exhibit E. 5 is the list of stockholders mentioned at foot of page 1 of Exhibit E. A.

(Witness being shown paper produced and marked for identification Exhibit E. 6, testified:)

That signature at bottom was his own; that transmissions referred to in Exhibit E. 6, were made on or about its date, as therein indicated.

(Witness being shown paper produced and marked for identification Exhibit E. 7, testified:)

That A. A. Housman & Co. were transfer agents up to about May 1, 1909, and were succeeded by the plaintiff at Seattle as understood by the witness.

(Witness being shown paper produced and marked for identification, Exhibit E. 8, testified:)

That signature attached to the foot was his own; contents of letter acknowledging receipt of telegram notifying him of appointment of transfer agent at Seattle; that the change of transfer agent was the reason of transmission of the transfer books—other records had preceded this telegram.

(Witness being shown paper produced and marked for identification Exhibit E. 9, testified:)

That transfer books referred to therein were transmitted by him as indicated in Exhibit E. 9.

(Witness being shown paper produced and marked for identification Exhibit E. 10, testified:)

That the signature at the foot of that letter was his own. That the documents and records referred to in Exhibit E. 10, were transmitted by him as therein advised to the plaintiff at Seattle.

The largest part of the 500,000 shares of common stock concerning which he was interrogated, which was issued to A. A. Housman & Company, to be delivered by them upon order of the preferred stock subscribers, was registered in name of A. A. Housman & Company.

Such part of that 500,000 shares as were required by the subscribers to preferred stock to register in their name, would not be registered in name of A. A. Housman & Company. That common stock wouldn't be subject to demand by preferred stock subscribers until they had paid their $5. Stocks for delivery against the subscription to the preferred issue were issued in full paid form for the full amount and upon payment of the full amount of the individual installments. Transfer made of that stock rarely made into name of transferee; That A. A. Housman & Company issued proxies, as holders of common stock of plaintiff company, for voting at annual or special meetings of plaintiff; such proxies were so issued by them for meeting of stockholders of plaintiff held January 23, 1907, the nominees were the Corporation Trust Company, at Portland, Maine, Manter, James Manter, one of them.

(Exhibits E. 1 to E. 10 for identification, offered for plaintiff.)

J. L. LANDON, called and sworn as a witness for plaintiff, testified as follows:

Direct examination:

That his business was Accountant; followed that business seven or eight years; at one time associated with plaintiff in a clerical capacity, as Secretary, and as transfer agent at Seattle.

(Witness being shown paper marked Exhibit E. 4, letter dated New York, May 1, 1909, testified:)

That he saw it, notation on paper, May 6, 1909; was employed at date of letter by plaintiff, in clerical capacity, as an accountant; occasion of his examining that letter was to take care of the items mentioned therein; that he received at Seattle, in due course, on behalf of plaintiff, the articles enumerated in that letter.

(Witness being shown certificate of stock of plaintiff, Number G 101, for 160,099 shares of common stock, testified:)

That he received that certificate on or about the time he received the letter;

(Witness being shown stock ledger cards of plaintiff, testified:)

Those are the stock ledger cards referred to in that letter.

(Witness being shown paper marked Exhibit E. 5, list of stockholders, referred to in letter Exhibit E. 4, testified:)

That he got that list under separate registered cover; that the stock ledger cards referred to in letter **Exhibit E. 6, on or** about the date of the reception of that letter;

That nearly all this stuff—referring to items enumerated in letter Exhibit E. 4, including transfer books, came on about the same time, possibly an interval of a short time between; all received, in due course, as advised in the letter;

(Witness identified the transfer books which were shown to him.)

(Witness being shown Exhibit E. 8, letter dated May 6, 1909, letter read in evidence, testified:)

That he thought that referred to the same books which are referred to in Exhibit E. 4, where it recites: "we shall send you by express on the 3d instant the transfer books, ledger, cards, etc."

(Witness being shown Exhibit E. 9, letter of May 12, 1909, letter read in evidence, testified:)

These (the transfer books) are the books; and that the letter was received by him in due course of mail with regard to its date.

(Exhibit E. 1, letter dated San Francisco, April 4, 1906, offered in evidence, by plaintiff, objected to by defendant, objection overruled and exception noted, and read in evidence.)

Exhibit E 2, stock subscription, Exhibit E 3, telegram from Rosene to Housman;

Exhibit E 4, letter of A. A. Housman & Co. of May 1, 1914;

Exhibit E 5, list of stockholders of April 1, 1909;

Exhibit E 6, letter of A. A. Housman & Co. of May 1, 1909.

All offered by plaintiff and received and read in evidence and marked as above.)

(Ruling on Exhibit E 17 stock ledger card, offered in evidence by plaintiff, ruling reserved by the court.)

(Exhibit E 16, stock certificate No. G 101, for 160,099, shares of common stock, offered by plaintiff and received in evidence, copy of same substituted for original with consent of Court and Counsel for defendant.)

(Exhibit E 8 letter of A. A. Housman & Co. of May 6, 1909, offered in evidence by plaintiff; objected to by defendant; objection sustained by court; ruling of court on Exhibit E 8 applied by court to all correspondence with which defendant is not connected, and which has not been brought to notice of

The largest part of the 500,000 shares of common stock concerning which he was interrogated, which was issued to A. A. Housman & Company, to be delivered by them upon order of the preferred stock subscribers, was registered in name of A. A. Housman & Company.

Such part of that 500,000 shares as were required by the subscribers to preferred stock to register in their name, would not be registered in name of A. A. Housman & Company. That common stock wouldn't be subject to demand by preferred stock subscribers until they had paid their $5. Stocks for delivery against the subscription to the preferred issue were issued in full paid form for the full amount and upon payment of the full amount of the individual installments. Transfer made of that stock rarely made into name of transferee; That A. A. Housman & Company issued proxies, as holders of common stock of plaintiff company, for voting at annual or special meetings of plaintiff; such proxies were so issued by them for meeting of stockholders of plaintiff held January 23, 1907, the nominees were the Corporation Trust Company, at Portland, Maine, Manter, James Manter, one of them.

(Exhibits E. 1 to E. 10 for identification, offered for plaintiff.)

J. L. LANDON, called and sworn as a witness for plaintiff, testified as follows:

Direct examination:

That his business was Accountant; followed that business seven or eight years; at one time associated with plaintiff in a clerical capacity, as Secretary, and as transfer agent at Seattle.

(Witness being shown paper marked Exhibit E. 4, letter dated New York, May 1, 1909, testified:)

That he saw it, notation on paper, May 6, 1909; was employed at date of letter by plaintiff, in clerical capacity, as an accountant; occasion of his examining that letter was to take care of the items mentioned therein; that he received at Seattle, in due course, on behalf of plaintiff, the articles enumerated in that letter.

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That he received that certificate on or about the time he received the letter;

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Those are the stock ledger cards referred to in that letter.

(Witness being shown paper marked Exhibit E. 5, list of stockholders, referred to in letter Exhibit E. 4, testified:)

That he got that list under separate registered cover; that the stock ledger cards referred to in letter Exhibit E. 6, on or about the date of the reception of that letter;

That nearly all this stuff—referring to items enumerated in letter Exhibit E. 4, including transfer books, came on about the same time, possibly an interval of a short time between; all received, in due course, as advised in the letter;

(Witness identified the transfer books which were shown to him.)

(Witness being shown Exhibit E. 8, letter dated May 6, 1909, letter read in evidence, testified:)

That he thought that referred to the same books which are referred to in Exhibit E. 4, where it recites: "we shall send you by express on the 3d instant the transfer books, ledger, cards, etc."

(Witness being shown Exhibit E. 9, letter of May 12, 1909, letter read in evidence, testified:)

These (the transfer books) are the books; and that the letter was received by him in due course of mail with regard to its date.

(Exhibit E. 1, letter dated San Francisco, April 4, 1906, offered in evidence, by plaintiff, objected to by defendant, objection overruled and exception noted, and read in evidence.)

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Exhibit E 5, list of stockholders of April 1, 1909;

Exhibit E 6, letter of A. A. Housman & Co. of May 1, 1909.

All offered by plaintiff and received and read in evidence and marked as above.)

(Ruling on Exhibit E 17 stock ledger card, offered in evidence by plaintiff, ruling reserved by the court.)

(Exhibit E 16, stock certificate No. G 101, for 160,099, shares of common stock, offered by plaintiff and received in evidence, copy of same substituted for original with consent of Court and Counsel for defendant.)

(Exhibit E 8 letter of A. A. Housman & Co. of May 6, 1909, offered in evidence by plaintiff; objected to by defendant; objection sustained by court; ruling of court on Exhibit E 8 applied by court to all correspondence with which defendant is not connected, and which has not been brought to notice of

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Such part of that 500,000 shares as were required by the subscribers to preferred stock to register in their name, would not be registered in name of A. A. Housman & Company. That common stock wouldn't be subject to demand by preferred stock subscribers until they had paid their $5. Stocks for delivery against the subscription to the preferred issue were issued in full paid form for the full amount and upon payment of the full amount of the individual installments. Transfer made of that stock rarely made into name of transferee; That A. A. Housman & Company issued proxies, as holders of common stock of plaintiff company, for voting at annual or special meetings of plaintiff; such proxies were so issued by them for meeting of stockholders of plaintiff held January 23, 1907, the nominees were the Corporation Trust Company, at Portland, Maine, Manter, James Manter, one of them.

(Exhibits E. 1 to E. 10 for identification, offered for plaintiff.)

J. L. LANDON, called and sworn as a witness for plaintiff, testified as follows:

Direct examination:

That his business was Accountant; followed that business seven or eight years; at one time associated with plaintiff in a clerical capacity, as Secretary, and as transfer agent at Seattle.

(Witness being shown paper marked Exhibit E. 4, letter dated New York, May 1, 1909, testified:)

That he saw it, notation on paper, May 6, 1909; was employed at date of letter by plaintiff, in clerical capacity, as an accountant; occasion of his examining that letter was to take care of the items mentioned therein; that he received at Seattle, in due course, on behalf of plaintiff, the articles enumerated in that letter.

(Witness being shown certificate of stock of plaintiff, Number G 101, for 160,099 shares of common stock, testified:)

That he received that certificate on or about the time he received the letter;

(Witness being shown stock ledger cards of plaintiff, testified:)

Those are the stock ledger cards referred to in that letter.

(Witness being shown paper marked Exhibit E. 5, list of stockholders, referred to in letter Exhibit E. 4, testified:)

That he got that list under separate registered cover; that the stock ledger cards referred to in letter Exhibit E. 6, on or about the date of the reception of that letter;

That nearly all this stuff—referring to items enumerated in letter Exhibit E. 4, including transfer books, came on about the same time, possibly an interval of a short time between; all received, in due course, as advised in the letter;

(Witness identified the transfer books which were shown to him.)

(Witness being shown Exhibit E. 8, letter dated May 6, 1909, letter read in evidence, testified:)

That he thought that referred to the same books which are referred to in Exhibit E. 4, where it recites: "we shall send you by express on the 3d instant the transfer books, ledger, cards, etc."

(Witness being shown Exhibit E. 9, letter of May 12, 1909, letter read in evidence, testified:)

These (the transfer books) are the books; and that the letter was received by him in due course of mail with regard to its date.

(Exhibit E. 1, letter dated San Francisco, April 4, 1906, offered in evidence, by plaintiff, objected to by defendant, objection overruled and exception noted, and read in evidence.)

Exhibit E 2, stock subscription, Exhibit E 3, telegram from Rosene to Housman;

Exhibit E 4, letter of A. A. Housman & Co. of May 1, 1914;

Exhibit E 5, list of stockholders of April 1, 1909;

Exhibit E 6, letter of A. A. Housman & Co. of May 1, 1909.

All offered by plaintiff and received and read in evidence and marked as above.)

(Ruling on Exhibit E 17 stock ledger card, offered in evidence by plaintiff, ruling reserved by the court.)

(Exhibit E 16, stock certificate No. G 101, for 160,099, shares of common stock, offered by plaintiff and received in evidence, copy of same substituted for original with consent of Court and Counsel for defendant.)

(Exhibit E 8 letter of A. A. Housman & Co. of May 6, 1909, offered in evidence by plaintiff; objected to by defendant; objection sustained by court; ruling of court on Exhibit E 8 applied by court to all correspondence with which defendant is not connected, and which has not been brought to notice of

defendant, i. e. Exhibits E 4, E 6, E 8, E 9, and E 10; Exhibit E 1 not included in this ruling but permitted to stand.)

(No cross examination.)

(Witness excused.)

A. H. KELLOGG, called and sworn as witness for plaintiff testified, as follows:

(Direct examination.)

That his business was transportation; connected with Alaska Lighterage & Commercial Company, Secretary of plaintiff since January, 1910;

(Witness being shown first minute book of plaintiff, which was identified in deposition of Edward A. Pierce, at Portland, Maine, testified:)

That it was the first minute book of directors and stockholders of plaintiff, first seen by witness in office of plaintiff in 1910; that on page 40 was a transfer of subscription to stock from W. F. Crummett, James J. Hernan, George C. Ricker, J. L. Brophy, and Clarence E. Eaton, to John Rosene, six shares.

(Transfer of 6 shares dated March 20, 1906, offered in evidence by plaintiff.)

That he recognized signature on page 40 of minute book as that of John Rosene, that he had seen it a great many times, had seen him (Rosene) sign it.

Cross examination:

Think in 1908 saw Rosene sign his name to several documents; was not present when Rosene signed on page 40 (of minute book); didn't know when he signed it.

(Sufficiency of proof of signature of Rosene on page 40 of minute book objected to by defendant.)

JOHN ROSENE called and sworn as a witness for plaintiff, testified as follows:

(Witness being shown on page 40 of minute book of plaintiff, referred to Exhibit E. 21, name "John Rosene" testified:) That he believed that was his signature.

(Transfer on page 40 of plaintiff's minute book offered in evidence by plaintiff, received in evidence and marked Exhibit E. 21.)

(Minutes of meeting identified by witness Manter as minutes of meetings of signers of articles of incorporation,

the stockholders and board, at Portland, Maine, and subsequent minutes as identified by witness Pierce of the meetings of the board, of plaintiff, offered in evidence by plaintiff, objected to by defendant as incompetent, irrevelant and immaterial, being the record of plaintiff that defendant had no connection with; objection overruled by the court.)

(Plaintiff introduced in evidence Exhibit D. 4, certificate of organization of plaintiff.)

Exhibit D. 5, minutes of meeting of signers of articles of incorporation.

Exhibit D. 6, minutes showing adoption of By-Law No. 3, By-Law No. 6, By-Law No. 9, By-Law No. 25.

Exhibit D. 7, minutes of first meeting of plaintiff's directors on March 19, 1906.

Exhibit D. 8, minutes of first annual meeting of plaintiff's stockholders at Portland, Maine, on March 19, 1906.

Exhibit D. 2, minutes of meeting of board at New York, March 21, 1906.

Exhibit D. 9, minutes of meeting of stockholders March 29, 1906, at Portland, Maine.

Exhibit D. 10, minutes of stockholders' meeting of January 23, 1907.

Documents as offered are received in evidence and marked as above.

No cross examination.

Witness excused.

A. H. KELLOGG, witness for plaintiff, recalled, testified as follows:

(Witness being shown Exhibit D. 11 minutes of meeting of stockholders of January 10, 1912;

Exhibit D. 14, minutes of stockholders' meeting in Portland, Maine, January 15, 1912, and being shown book of minutes of plaintiff, testified:)

That was the minute book of stockholders and directors of plaintiff, kept in its Seattle office.

(Witness being referred to minutes of board meeting. January 22, 1912, testified:)

That he was present at that meeting; that the resolutions and motions and transactions of business were duly had as described

in those minutes; that was a true minutes of the meeting of the board at that time, authorizing the corporation to do business in state of Washington, and of appointment of statutory agent under laws of state of Washington, and authorizing necessary papers from state of Maine to be filed in office of Secretary of State of state of Washington, and levying assessment No. 1 for 20 and of No. 2 for 50 per cent of the subscription, on the subscriptions for the preferred stock, and providing for a credit on those assessments to those subscriptions where the subscribers had paid any part of the amount sought to be realized by those assessments; notice of which meeting was given to all the directors;

(Witness shown paper marked Exhibit S. 1½ for identification, testified:)

That was a notice to the plaintiff's directors of a special meeting of board of directors to be held at 4 o'clock P. M. on 22d day of January, 1912, signed by the President; followed by the acknowledgement of notice from each and every director; that that was the signature of President on that date and of all the directors; and that paper was in existence as witness then saw it of date of that meeting.

(Notice as Exhibit S 1½ minutes of board of directors of January 22, 1912, as Exhibit S. 1, offered in evidence by plaintiff.)

Cross examination.

That witness procured the signatures to those notices, on date of notice January 20, that would be date it was signed; all directors were resident in Seattle, they were all here present in the city at that time; Mr. Loewenherz was a resident of Seattle; M. C. Farr lived here; D. C. Young lived here in 1912; that he remembers that he got the signatures of all those parties before the date of that meeting on the 22d.

(Documents received in evidence and marked respectively Exhibits D. 11, D. 14, S. 1, and S1½.)

(Certificate of Secretary of state of State of Washington, showing compliance with laws of state of Washington, relating to a foreign corporation doing business in state of Washington, change of corporate name and increase of directors, appointment of statutory agent, offered in evidence by plaintiff, received in evidence and marked Exhibit F.)

(Examination of witness continuing:)

That he knew of giving of notice of assessments No. 1 and No. 2, as levied by meeting of board as above;

(Witness being shown paper marked for identification Exhibit S. 2, identified them as affidavit of witness as to his mailing, by registered mail, to defendant, notice of assessment No. 1, notice of credit of assessment No. 1, and notice of assessment No. 2.)

(Witness being shown paper marked for identification Exhibit S. 3; identified same as receipt for those registered notices, secured by witness at that time; that papers "A," "B," "C," attached to the affidavit are true copies of the notices sent in registered mail, notices of assessments No. 1 and No. 2, due under their stock subcription and of the credit of No. 1, where they had paid up.)

(Documents offered in evidence by plaintiff and received in evidence and marked Exhibits S. 2 and S. 3.)

(License issued by state of Washington to plaintiff, offered in evidence by plaintiff, received in evidence and marked Exhibit F. 1.)

(Stipulation between plaintiff and defendant dated November 2, 1915, and 4 transfer books offered in evidence by plaintiff, received in evidence and marked respectively, Exhibits E 11, E 12, E 13, E 14, and E 15.

(Examination of witness continuing:)

Re-direct examination.

Those are the transfer books of plaintiff now in possession of plaintiff, and were at the date of the stipulation above.

(Issues of stock as shown by transfer books to parties therein named on pages 1 and 2 put in evidence.)

(Certified copy of certificate of incorporation of defendant offered in evidence by plaintiff, received in evidence and marked Exhibit F. 2.)

Witness excused.

E. J. MATHEWS, called and sworn as a witness for plaintiff, testified as follows:

Was a director of plaintiff in February 1910; resigned as President in January, 1910.

No cross examination.

Witness excused.

T. A. DAVIES, called and sworn as a witness for plaintiff, testified as follows:

Am President of plaintiff, have been such since 1910; was President on February 4, 1910;

(Witness being shown letter marked Exhibit E. 10, in the Pierce, New York, deposition, testified:)

That he had seen that letter before;

(Witness being shown books, journal, cash book and ledger marked for identification, Exhibits E. 18, E. 19 and E. 20, testified:)

Those books were the ones referred to in letter; were received by him shortly after date of that letter from the New York office.

(Books marked respectively Exhibits E. 18, E. 19 and E. 20.)

No cross examination.

Witness excused.

CHARLES A. McMASTERS, called and sworn as a witness for plaintiff, testified as follows:

That he was Secretary of defendant; such Secretary since April 1, 1911;

(Witness produces minutes of defendant's stockholders' meetings, board of trustees' meetings and executive committee meetings, testified:)

Those are the minutes of defendant covering the minutes of April, May, June, July, August and September, 1906; all of the minutes; was not connected with the Company at that time; were delivered over to him by his predecessor as entire books of defendant;

(Witness being shown minutes of meeting defendant's board of trustees, of date April 12, 1906, testified:)

J. D. Trenholme, Secretary, signed those minutes; recognized his signature;

(Witness reads in evidence minutes referred to).
(and testified:)

He had read all of minutes of defendant's board of trustees of April 12, 1906; from beginning to end, as they appear of record;

(Record, minutes of defendant's board of trustees of April 12, 1906, offered in evidence by plaintiff.)

(Upon examination by Mr. Graves, counsel for defendant, testified:)

He was not Secretary at that time; Mr. J. D. Trenholme, then present in court room, was the Secretary at that time; had no personal knowledge whatever whether or not those minutes record everything that took place on that day; only what he heard; had no personal knowledge whether or not anything was expressly withheld at request of anybody from the minutes; was not connected with the Company at that time.

(Mr. Graves, counsel for defendant, contended that before minutes go before the jury, the Secretary, who was present and took down the minutes, should be called as a witness and allowed to testify as to what occurred;

The court ruled: those minutes being produced in response to an order issued to defendant to produce it, at least prima facie, and if they are not the miuntes, then it can be shown;

Defendant withdraws all objections to minutes with express understanding defendant be allowed to call Secretary to show exactly what occurred at that meeting;

The Court: The objection is overruled. Miuntes admitted as Exhibit G.)

(Witness being shown minutes of defendant's board of trustees of September 5, 1906, date when counsel for defendant in his opening statement stated that this matter again came up before board, identified as Exhibit H, witness read in evidence, same as follows:)

"RESOLVED That the President be authorized to subscribe to the stock of the Northwestern Development Company for this Company in the sum of One Hundred and twenty-five thousand dollars."

"WHEREAS It is necessary to provide funds to build and purchase additional steamers for the Companies' use; RESOLVED that the President be instructed to sell and dispose of the stock

held by this Company in the Northwestern Development Company down to Fifty thousand dollars."

(Witness continuing:)

Those were the only minutes found under that date of defendant's board of trustees; were produced there by him by reason of an order of court served upon him;

(Witness being shown minutes of defendant's board of trustees of April 10, 1907, identified as Exhibit I, read in evidence, that part that referred to the stock subscription, in evidence as follows:)

"Resolved, that this corporation does hereby affirm its subscription for the capital stock of the Northwestern Development Company in the sum of $125,000, par value, and no more and the attorney of the company be and he is hereby authorized and directed and required to prepare the necessary notice to be sent by the Secretary to the Northwestern Development Company, notifying the said Northwestern Development Company that no subscription for the capital stock of that company was ever authorized in any sum or sums whatever except for $125,000.

Moved by Mr. Eccles that the resolution be adopted which motion received a second. A vote being taken, all of the members present voted for the resolution and none against it and it was declared adopted."

That there were minutes of defendant's board of trustees between April 12, 1906, and September 5, 1906; trustees met on April 18; no reference whatever in minutes of that meeting to subscription of defendant by John Rosene to preferred shares of plaintiff's stock; John Rosene was present at that meeting; meeting of trustees May 7, 1906; no reference whatever in that meeting to the subscription referred to; meeting of May 14, 1906, nothing in that meeting with reference to that subscription; meeting of trustees July 10, 1906, Rosene present, a quorum of board—nothing there in reference to that subscription; meeting of July 20, John Rosene present, nothing there in reference to that subscription; next meeting was on September 5, 1906.

(Witness being shown minutes of meeting of defendant's executive committee of September 18, 1907, witness read in evidence a resolution there with reference to a proxy as follows:)

"Upon motion, resolved that this Company's proxy be forwarded to Mr. S. W. Eccles to represent this company at a special stockholders' meeting of the Northwestern Development Company to be held at the office of said corporation at 281 St. John St.,

Portland, Maine, October 3, 1907, at 10 o'clock, A. M., said proxy to be given with power of substitution."

(Witness continuing:)

Mr. Eccles, there referred to, was a director in the Company at the time;

(Witness read in evidence a further resolution there with reference to this stock, as follows:)

"Upon motion, resolved that the Treasurer of this Company be instructed to have this Company's stock in plaintiff Company reissued in name of defendant."

(Minutes of April 10, 1907, marked Exhibit J. minutes of September 18, 1907, marked Exhibit K.)

Further proceedings adjourned until the following day, November 24, 1915, at hour of 10 o'clock A. M.

November 24, 1915, 10 o'clock A. M.

Continuation of proceedings pursuant to adjournment, all parties present, names of jurors called, all present.

(Plaintiff offered in evidence:

Exhibit D12.

Exhibit D13.

Exhibit D17.

Exhibit D18.
attached to Manter deposition.)

MR. A. H. KELLOGG recalled as witness for plaintiff, testified as follows:

(Witness being shown affidavit signed A. H. Kellogg, of 29th day of December, 1911, Exhibit D 13 attached to the Manter deposition, testified:)

That was his signature; that he swore to it on the date given before a Notary Public; that the statements therein contained were true;

(Affidavit, Exhibit D 13 read in evidence by witness.)

(Witness continuing;)

That the notice and list of stockholders were attached; that was a true list of the stockholders of date of affidavit, with number of shares, common and preferred, held by each, as shown by the books of the Company; that he verified it at that time; that there

had been no further original issue of preferred stock since tha affidavit was made.

(Witness being shown a further affidavit signed A. H Kellogg, of date February 8, 1912, testified:)

That was his signature; that he swore to that and statement therein contained are true.

(Witness read in evidence, affidavit Exhibit S 2:)

(Witness continuing:)

The annexed papers, actually attached, were: Exhibit A notice of special meeting of stockholders of plaintiff to be held first day of March; Exhibit B was list of stockholders to whom notice of the special meeting was sent on January 29, 1912; the telegram certifying names of plaintiff's stockholders as per list of date February 29, 1912, was sent by him; that statements therein contained were true and were true at that time.

(Documents received in evidence marked Exhibits D. 12, D. 13, D. 17 and D. 18.)

Cross examination:

He took list of stockholders from the books of company; it is a complete list of all stockholders appearing on books of plaintiff; it shows number of shares held by each stockholder, as of record, at that time and total number of outstanding shares both of preferred and common stock; preferred stock outstanding at that time 339,890 shares; common shares outstanding 750,000; the 339,890 of preferred was at $5 per share: that was all of the preferred shares that books show had ever been issued; not all of preferred shares that books show had ever been subscribed for; stock subscriptions were more than stock issuance; could not say off-hand what was total stock subscription; would have to refer to the records; had a tabulated list of that; about one million six hundred odd thousand dollars; there had been no subscription since then; total of preferred stock had never been subscribed for.

(Examination by counsel for plaintiff:)

Was not attempting to be accurate as to figures concerning which Mr. Bogle (for defendant) asked him; said he could not recall the exact figures from memory.

(Cross examination resumed:)

He did know that all the preferred stock had not been subscribed for.

(Plaintiff offered in evidence Exhibit D. 16 minutes of special meeting of its stockholders of March 1, 1912;

Objected to by defendant.

Court reserved its ruling.

Document marked Exhibit D. 16 for identification.)

(Plaintiff offered in evidence Exhibits T. 1, T. 3, T. 4, T. 5;

Objected to by defendant.

Court reserved its ruling.)

CHARLES A. McMASTERS, recalled as a witness for plaintiff, testified:

(Witness being shown minutes of meeting of defendant's stockholders of April 18, 1906, testified:)

He did not find anything there which refers to that subscription; nothing in minutes of stockholders' meeting of April 18, 1906, with reference to that subscription.

(Witness being shown minutes of regular meeting of defendant's executive committee on 4th of September, 1907, first meeting of that committee that month, testified:)

That those minutes had no reference to John Rosene except that Rosene was appointed one of a committee to adjust salaries and minor matters; that there was a special meeting on 9th of September, which had no reference to John Rosene;

(Witness being shown minutes of Executive Committee of defendant of October 23, 1907, at request of plaintiff, read same in evidence; objected to by defendant. Objection sustained by court; jury instructed not to consider at that time minutes as last read; exception noted for plaintiff.)

(Witness continuing:)

That he was treasurer of defendant; had been such since April 1, 1911; as such was Custodian of its assets;

As such had in his possession capital stock of plaintiff held and owned by defendant;

(Witness produced it.)

That there were 25,000 shares of preferred stock and 25,000 shores of common stock of plaintiff; that stock when he assumed office of treasurer, was in New York, that he received the stock in July, 1915; that it had not theretofore been in his possession as treasurer.

(List of stock last aforesaid showing number of shares the series number, date of issue, amount of shares of each certificate, as follows:

Preferred Stock Issued		Common Stock Issued	
Certificate No.	No. shares	Certificate No.	No. shares
F 6 June 9th, 1906.....	1000	F 15 June 9th, 1906	1000
F 7 July 24th, 1906	1000	F 24 July 24th, "	1000
F 8 " " "	1000	F 25 " " "	1000
F 9 " " "	1000	F 26 " " "	1000
F 10 " " "	1000	F 27 " " "	1000
F 11 Nov. 7th, "	1000	F 43 Nov. 7th, "	1000
F 12 " " "	1000	F 44 " " "	1000
F 13 " " "	1000	F 45 " " "	1000
F 14 " " "	1000	F 46 " " "	1000
F 15 " " "	1000	F 47 " " "	1000
G 37 April 2nd, "	10000	G 52 April 2nd, "	2000
G 38 " " "	2000	G 53 " " "	10000
G 41 " " "	3000	G 55 " " "	3000
	25000		25000

All issued to A. A. Housman & Co.

All endorsed as assigned to NORTHWESTERN COMMERCIAL CO. under date of September 24, 1907.

Offered in evidence by plaintiff, in lieu of stock certificates themselves; objected to by defendant;

(Witness continuing:)

Assumed office of Secretary at same time he assumed office of Treasurer; had a list of records of office of secretary turned over to him at that time.

(Witness producing list.)

That stock was not enumerated among the items in that list; that he received the minute book at that time; received no memoranda or data at all purporting to be any part of the minutes other than as contained in the book he had identified that and the previous day, there was no paper or data exclusive of the papers contained within the covers of those minute books identified as minute books of company, pertaining to the minutes of the company; received the entire file of the correspondence of defendant as secretary, was turned over to him; did not think it true that only vouchers appertaining to claims for damages or records of wrecks, and that correspondence was not turned over to him; made a demand for entire records of office of secretary and was assured by Captain Jarvis that everything in his possession at that time was turned over to him (witness); did not turn over anything he did not have in his possession; he (Captain Jarvis) did not state

that there were formal records of the company which were not then turned over to witness, and made no reference to them.

Cross examination.

The stock he spoke of in plaintiff was all issued in name of A. A. Housman & Company; it all bears the endorsement on the back of the certificate of transfer by A. A. Housman to the defendant under date of September 24, 1907; that is true of all those certificates;

(Witness is asked by counsel for defendant in making his memoranda to give the date of the issuance and date of the transfer.)

Those (certificates of stock) did not come into his actual manual possession until this last summer in July; was requested and served with same notice by Mr. Gorham to produce them; he then asked for them and they sent them to him; the stockholders' meeting of April 18, 1906, he was asked about, was the annual meeting—the record shows; the general annual meeting of the stockholders of defendant; did not find any reference to any subscription to stock in plaintiff in minutes of stockholders' meeting of April 18, 1906; those minutes do contain a fairly full detail report from the President to the stockholders of all of the large investments of the Company; did not find any reference to any investment in plaintiff.

Witness excused.

W. T. FORD called and sworn as a witness for the plaintiff, testified as follows:

He was the auditor of defendant, had been such since spring of 1909; was not identified with the Company prior to that time; had the account books of defendant there in court with him.

(Witness requested to turn to Journal of April, 1906, and see if he had any entry there of date of April 21, 1906, Northwestern Development Company $50,000, testified:)

No entry at all; on that date; there are some on April 18, to Northwestern Development Company; don't know what the item is; two items of $20,000; there is an item of $50,010, April 30th; that was simply a transfer crediting the plaintiff with $50,000 and charging "investment;" just shows among the investments, does not say there what kind of an investment, does not show the character; no where in the record anything to indicate as to the character of that investment of $50,000; didn't think it was a fact that it was lost to the stockholders as to where that money went to,

further than that it was a mere investment; the books showed that it was an investment; didn't know whether it was lost to them or not; could not say that so far as the identity of the particular thing in which the money was invested, it was lost, knowledge to the Company lost, don't know; had no voucher No. 101 of July 15, 1901; had voucher No. 5366 which plaintiff's counsel wanted; that represents $25,000; it shows that the plaintiff was credited with $25,000 and investment account was charged with it, date of voucher July 15, 1906; No. 5366; there was an entry on Journal September 6, for $25,000 for amount of stock subscription charged to Investment account and credited to account of plaintiff; carried from journal into plaintiff's account in ledger; that ledger account was an open current account;

(Witness produces his ledger account of Northwestern Development Company, which is marked for identification Exhibit K 1:)

On this ledger account of defendant with Northwestern Development Company, there is a credit item of April 30, 1906; of $50,010, marked "investment"; he put that in there himself; on July 15, an item of of $25,000 credited Northwestern Development Company, also "investment"; those items, that "investment" was put by him to identify the item; knew that the corresponding charges were in the investment account; those items represent the investment of that subscription so far as there was any subscription; on September 6, 1906, a credit of $25,000 investment; on September 15, 1906, $25,000 capital stock purchased, that is what it says; that refers to the entry on the ledger of September 25; the entry is posted in the Journal September 15 and it says "capital stock purchased September 15, 1906; that shows what it is for; he did not make the entry; he was reading the entry; entry entered September 25; it is a corresponding entry to the entry in the ledger; did not have the balance sheets of September 30, 1906; they were not turned over to him by his predecessor;

(Counsel for plaintiff asks Mr. McMasters if the balance sheets are in court, they were included in the order directing defendant to produce the balance sheets of the several months and the order was served on Mr. McMasters as Secretary:)

The witness:

He examined all the records of the Company and could never find any balance sheets of the dates which counsel for plaintiff mentioned there anywhere; had a monthly balance sheet, did not keep them at that time; didn't know whether there was a monthly balance prior to his advent into office; would not say there was not; did not know; the entries he had referred to would be carried into the balance sheets of the several months in the ordinary course

of bookkeeping; did not have the annual report of defendant of April 30, 1906; could not find a copy in his office.

(McMasters: I made a thorough search and could not find it.)

(Witness continuing:)

Had no record which would show the summary from which an annual report would be made in 1906, for the fiscal year; had the annual report of year 1907; thought he had it there among the papers; didn't seem to have them there;

(Witness is shown a paper by counsel for plaintiff,)

That is a copy of it; that is the same thing;

Here is the one.

(Witness producing copy of annual report of defendant for year ending April 30, 1907, marked Exhibit M.)

Identified it as report of defendant for April 30, 1907; that is what it says on the front of it; found among the Secretary's files.

(Counsel for defendant presumed it is the annual report, had no reason to question it.)

(Witness continuing:)

Might identify the items under column Northwestern Commercial Company stock holdings in other companies $993,012.50 if he had time to check it up; could not tell; it does not show an exact balance; did not have balance sheet of defendant of July 31, 1906, or August 31, 1906, or September 30, 1906; did not know whether there were any such balance sheets in existence; so far as he knew they were not in his office; had made a personal search;

(Document marked for identification M. offered in evidence by plaintiff: received in evidence and marked Exhibit M.)

Cross examination.

So far as he had been able to find, those balance sheets similar to ones which he had produced, were not kept prior to 1907, could not find them; was not connected with Company until 1909 in spring; item of $50,000 as Exhibit K1, is the entry on the ledger account of plaintiff on books of defendant; there was no reference in the journal entry which shows what makes up that $50,010; it does not show—reference to journal 394—what makes it up; the memorandum attached to voucher No. 5366 of July 15, 1906, of

$25,000, was attached to it when he first found the voucher on the files of the company; in the same condition as it was then.

(Voucher No. 5366 with attached memorandum offered in evidence by defendant, received in evidence as part of cross examination, and marked Defendant's Exhibit No. 1; and read in evidence to jury:)

(Witness continuing:)

The books of record show M. M. Perl was the Auditor of defendant in 1906; knew his signature; had seen it; that is Perl's signature to the memorandum at the bottom; had never seen Mr. Rosene write his signature but have seen checks and other documents; knew his signature; the signature to the memorandum above "J. R." is in his handwriting; the books would show at what time this entry was actually made; there is nothing there from which he could determine when the entry was actually made or when those instructions came into his hands; could not say; there is no other entries on the books throwing any further enlightenment on the journal entry, investment Northwestern Development Company capital stock purchased September 15, 1906, $25,000;

It refers to page 15; the other credit of $25,000 referred to is entered under date of September 6, 1906; so that those two items, together with the $25,000 which is represented by these vouchers No. 5366, apparently make up the $75,000 which was received, for which the Development Company received credit on the books of defendant;

Redirect examination.

This (Exhibit K1) was a mutual open current ledger account; In following October, 1906, there was a balance struck on that ledger account, in favor of plaintiff, in sum of $32,232.78; balance was settled by check payable to plaintiff delivered by defendant to plaintiff; all these are credits; that included all the credits on the plaintiff's account and this check closed the account.

Recross examination:

On August 31, the account shows a balance of $57,692.23 in favor of defendant; that is, after crediting the $25,000 under date of July 15, on August 31 the plaintiff still owed defendant fifty thousand and some odd dollars; subsequent to that, those other two entries of $50,000 were made;

Witness excused.

JOHN ROSENE, recalled as a witness for plaintiff, testified:

(Witness shown paper marked for identification, Exhibit L.)

That was his handwriting and his signature attached and signed thereto; that paper was addressed to Northwestern Commercial Company, date, October 30, 1906; that, apparently, he was in New York then; that was the letter head of defendant; could not say that was addressed to defendant concerning its business until he read it;

That this letter was addressed to the N. W. C. Co. but it really should be addressed to plaintiff;

Witness understood that it came to defendant but the officers of the two companies were together and the bookkeepers were the same but it was not the Commercial Company's business; it was the Development Company's business it referred to.

That he was President of defendant at that time; that Mr. Trenholme was secretary; that Mr. George Henderson was not fiscal agent; that Mr. Henderson had had that printed without witness' authority, but it did not amount to that; he was not the President, he was the Secretary of the plaintiff; and not the fiscal agent of the defendant; he was the secretary of plaintiff company but he was not the agent of the defendant.

(Witness shown letter marked for identification Exhibit N:)

That was his (witness') signature attached to that letter; would think that letter was sent to Henderson, secretary of plaintiff, on or about the date it is dated, it looked that way.

Letter offered by plaintiff and received in evidence and marked Exhibit N.

Cross Examination.

That letter was not written by witness with the knowledge of the defendant's board of trustees; they did not know anything about that; the statement in the letter that $50,000 of the $60,000 par value preferred stock is to be credited on the $245,000 due witness from the company (plaintiff) on the mining property purchased by the plaintiff referred to the $245,000 cash that was actually paid to the owners of the mining claims for the claims and alleged water rights, etc; that was the same purchase which is referred to in the minutes of the plaintiff which had been introduced in evidence here, which was evidenced by some agreement between witness and the plaintiff.

Witness excused.

Thereupon at request of plaintiff the Clerk of the Court produced a stipulation between the parties to this suit relative to the amendment of a former complaint of plaintiff and to the amend-

ment of defendant's answer to such former complaint, dated May 11, 1914, which plaintiff thereupon offered in evidence as tending to show a delivery of this stock by plaintiff to defendant, during the year 1906, as an extra-judicial statement made at the time, that this stock was delivered by plaintiff to defendant between April 4, 1906, and November 9, 1906, to which defendant objected and which objection was sustained by the court to which ruling of the court plaintiff excepting and its exception was allowed.

Thereupon plaintiff offered in evidence paper marked Exhibit D 3, attached to the Manter deposition heretofore read in evidence, being certificate of the Secretary of State of the state of Maine that the certificate of authoritization, was filed, certificate of change of corporate name, and certificate as to increase of number of directors, of plaintiff, which was received in evidence and marked Exhibit D3.

WILLIAM T. FORD recalled as witness for plaintiff, testified:

That he has not made examination which counsel for plaintiff had asked him to make; that he would made it.

No cross examination.

Witness excused.

J. D. TRENHOLME, called as a witness for plaintiff and sworn, testified:

That his name was J. D. Trenholme, was formerly secretary of defendant, he thought up to the spring of 1907, from its inception.

(Witness showed paper marked for identification Exhibit N1:)

That it looked like one of the statements of defendant for the fiscal year, March 10, 1905, to April 30, 1906; that he would say there was an annual statement made at that time; that he presumed he signed it as secretary, that he usually did those things; that the statement was made up by their auditor; that it was never his custom to go into the accounting department and verify any of these statements—the signing of them by him was just simply,—prefunctory duty;

That the auditor prepared these annual statements, prepared all their statements; that sometimes they were for distribution among the stockholders, sometimes not; didn't think that these annual statements were mailed out to every stockholder they had it was the usual custom in those early days;

(Witness asked; were they handed out to the stockholders holding a majority of the stock.)

That it was a long time back;

That it (Exhibit N-1) was addressed to the stockholders; which would indicate on its face that it was addressed to all of the stockholders.

(Witness asked: Did he recognize that as one of the statements which was issued at that time.)
That he would say that it was, yes;

(Witness' attention called to the item on Exhibit N-1, of capital assets as per company's books, April 30, 1906 $2,917,-532.96, and witness asked if he knew what that item consisted of, generally speaking.)

That they had a number of subsidary companies; and it would be the stock, the investment in the stock in these other companies and investments in various enterprises that they were interested in at that time; if it were accurate he thought it would include all the investments of his company; and if they had on their books an investment of $50,000 in April 1906, in the plaintiff's stock, it would be included in that item; did not know without referring to the books whether they did have it or not.

(Plaintiff offered in evidence Exhibit N-1;)

Examination by defendant.

That he could not identify this Exhibit N-1 by any signature on it; that he had not any personal recollection about it at all, any more than it was customary always to get out an annual report at every annual stockholders' meeting; did not know positively whether this was the one that was gotten out at that time, but would say that it was; said so because it purports to be a report of that kind, that was all; he would not expect to get up one unless it would be a real one; they were always gotten up by the auditor, by their bookkeeping department, that as secretary of the board of trustees he verified the statements to see what items made up the items that were shown on the aggregate, their statements that was prepared would show that—that was simply a consolidation of a great mass of figures; that was boiled down to three or four or five or six items, while in their general statements which would be prepared for verification, all those items would be segregated.

Paper received in evidence and marked Exhibit N-1.

Thereupon plaintiff offered as a part of the examination of Mr. Kellogg, with the consent of counsel for defendant, statement of plaintiff in re. stock subscription preferred, showing the original subscription and the amount of outstanding preferred stock as per ledger.

Paper received in evidence and marked Exhibit N-2.

Witness excused.

WILLIAM T. FORD, recalled as a witness for plaintiff, testified:

That the result of his investigation was that the item of $993,-012.50 shown here as stocks in other companies includes $125,000 counsel for plaintiff asked about.

That he could not tell whether or not in item of capital assets $2,907,532.96 in the annual report of 1906, Exhibit N-1, includes the item of $50,000 which he had testified was found in his ledger as an investment of his company in plaintiff's stock in April 1906; he couldn't prove that; this was the whole consideration, you would have to have another balance sheet to prove that, it was made up in a different form from that; his books were here (in court) did not know whether he could ascertain whether or not his books showed such capital assets without a lot of additional record here. He supposed of course, that it was; that he could not prove that without getting all the books and a complete balance from that date and he doubted if he could do it; the books were not all there; the ledger was a loose leaf ledger and hundreds of accounts had been transferred from time to time out of it and he didn't know whether he could possibly get them together to prove that.

Witness excused.

MORITZ THOMSEN, a witness, called and sworn on behalf of plaintiff, testified:

That his business was that of flour manufacturer; the Centennial Mill Company, of which he was President, for 26 years, since its inception; that its output ran from 11 to 14 million barrels a year; that he was a resident of Seattle for 17 years; was associated with defendant in 1906 as a director; didn't remember when he first became a director; it was prior to April 1906; was a stockholder at that time; was present at a meeting of defendant's board in early part of April 1906, at which, Rosene, President of defendant, reported having made subscription on behalf of defendant to preferred stock of plaintiff in sum of $250,000; at that meeting as far as he remembered, every member outside of Rosene took the stand that Rosene had no legal right to subscribe and, therefore, they would not recognize it, and he (Rosene) asked us as a matter of courtesy to him to not put anything in the minutes; that he (Rosene) would dispose of the stock in a few days and then call us together again; that a payment of $50,000 on that subscription was reported at that time;

That he would not say that there was any action of the board with respect to that payment, except they claimed he had no right to pay it.

That his idea was that Rosene claimed that he could dispose of the stock and he (witness) presumed that he (Rosene) knew what he was doing and that he knew what he could do and that he would dispose of it in a few days.

(As to what was done with relation to the $50,000) He was not sure but what personally he made the remark that if that proposition was such a good one as Rosene stated, that it might be well for the Company, perhaps, to keep the $50,000; didn't know if anybody concurred in his attitude; couldn't remember whether Captain Jarvis concurred with him; no action taken upon his suggestion that the Company keep the $50,000; no motion made by trustee present and put by chairman and disposed of by a vote of the trustees; affirming or disaffirming the contract; no resolution offered; Rosene asked us not to put anything on the minutes; there was no motion or resolution offered; could not anything go on the minutes until some action had been taken by the trustees; as to whether the board adjourned without taking action; didn't know how to construe that; some persons might say they took action—if everybody expressed themselves, whether that would be action or not; didn't know; know that everybody expressed themselves very strongly that the Company would not take this stock; nothing was put on the minutes; there was no minutes; there was nothing done by the trustees further than expressing themselves in the way he said;

Answering for himself he would say that the members of the board adjourned with the expectation of having the matter again come before the board at a subsequent meeting; and that the next meeting of defendant's board of trustees at which the matter of this subscription was discussed was some time in the fall of 1906, could not say the date; at which latter meeting he introduced a resolution as follows:

"Resolved that the President be authorized to subscribe for stock of the Northwestern Development Company for this Company in the sum of $125,000."

Cross Examination:

That at the April, 1906, meeting (of defendants' board) he thought there were present; Mr. Trenholme, Mr. Treat, Mr. Trimble, Mr. Rosene and himself; was not sure but Mr. L. Grunow was there; could not say for sure whether Mr. Jarvis was present; supposed the record would show; didn't recollect, would not say whether Mr. Hartman was present at that meeting; Hartman was defendant's attorney at that time; at that meeting, all of the trustees with exception of Mr. Rosene, expressed themselves that they would not take this stock for defendant in plaintiff company; that was the decision of all of them, if you go by what men say;

there was no difference between them on that; and he expressed that; that Mr. Rosene expressed that they would not make any minute of it, would not put any thing on the minutes about it; that he had quite a discussion at that meeting; that he expressed himself so far as he was concerned to the effect that Mr. Rosene had no authority to make that subscription and that the company would not sanction it; that he expressed himself that Mr. Rosene had no authority to make that subscription and he, as a trustee, opposed its standing; that as far as he remembered, didn't know the exact wording, they all expressed themselves in the same manner; supposed that the opinion expressed by the different trustees or resolution that might be offered, was what Rosene did not want them to put on the record;

That Rosene reported that he had already paid the $50,000.

(Witness asked: And after the trustees present had expressed themselves that they would not sanction this subscription, didn't Rosene want the board then to take at least to the $50,000 which had already been paid, and was not that the matter that was left open without any action, and about which witness expected there would be some action taken in the future.)

That he didn't know hardly how to answer that, because what his opinion was might not harmonize with the rest of them.

That he remembered of expressing himself by saying that, according to Rosene's story, it was a good thing for them to have and that they might stretch a point and keep this $50,000 of stock; that as far as he remembered, no other trustee expressed any agreement with that statement;

That at the meeting in September 5, 1906, at which the resolution was passed, authorizing the president of defendant to subscribe for $125,000 to plaintiff, there was discussion between the members of the board, the substnce of which was that they still felt that they had no business to take the stock, and another argument came up that inasmuch as they had paid in $125,000 that it might be better to take it than to try to get our money back; thought that it was reported at that meeting that the $125,000 had already been paid, did not remember by whom; had knowledge of these things probably a week or two before the meeting, in September; should say he got his information from Mr. Trenholme; at time resolution was passed in September 1906 knew it off-hand, by hearsay, that the plaintiff had been organized for the purpose of buying mining claims from Mr. Rosene; did not get the hearsay information in reference to the mining claims prior to September 1906;

That in September 1906 at time resolution was offered by him, did not know as to whom they had bought them from or who owned them.

Witness excused.

A. H. KELLOGG, recalled as a witness for plaintiff, testified:

That since adjournment he had made an examination of the books of the plaintiff, with respect to the issuance of $750,000 shares of common stock; that the evidence introduced in this case, as shown by the books (transfer books of plaintiff) was to the effect that there was 499,989 shares of that common stock issued in one certificate on April 2, 1906, to A. A. Housman & Company, which was correct; that as shown by his investigation, certificate number 101, series G, for 160,099 shares of common stock in the name of A. A. Housman & Co. was the balance of the common stock left after the difference between that and the 499 thousand shares was issued by A. A. Housman & Company to various parties; that his list of stockholders submitted to the January 1912 meeting of board (plaintiff) showed 399,890 shares of preferred stock outstanding; that if one share of common stock was issued for one share of preferred stock, or allowing one share of preferred stock to one share of common stock issued, there would be left from the 750,000 of the original common issue, after deducting the 250,000 that went to Rosene, 160,099 shares; which was then in the possession of the plaintiff.

Cross examination.

He thought that there was 250,000 shares of common stock issued to Rosene in four different amounts; they were issued to Rosene; some of them may have been transferred back and forth, could not say; did not know; did not know where those certificates are; could not say that they were in the hands of A. A. Housman & Co.; could not say who has been issuing proxies to vote them at the various meetings—would have to look at the books, could not recall, there had been several meetings; would look that up.

Witness excused.

T. A. DAVIES, recalled as witness for plaintiff, testified:

That he was president of plaintiff since January 1910; that he had on hand in the plaintiff, the common shares of stock in the name of A. A. Housman, as testified by Mr. Kellogg, in the sum of 160,099 shares;

That there had been, during his incumbency of the office of

president, no repudiation or notice of repudiation on the part of defendant of this subscription.

Cross Examination.

None, during his incumbency.

That he had received the original of which paper marked Defendants' Exhibit No. 2, was the carbon copy.

(Paper received in evidence marked Defendants' Exhibit No. 2, and read to court and jury).

When he said his company had never got any notice of repudiation since he became president, he had not overlooked that letter (Defendants' Ex. No. 2). Did not regard that as notice of repudiation; he came in in 1910 as President; very soon thereafter his company brought an action similar to this to recover on this same alleged subscription; think the defendant in that case in 1910 denied any liability, but am not sure; they must have denied it, we started in on the trial; his company took a nonsuit after going partly through the testimony, and then he started these proceedings to bring a new suit; said he did not regard that letter (Defendants' Exhibit No. 2) as notice of repudiation; that there had never been any notification of a repudiation of the Rosene subscription since he became president in January 1910; that the defendant never paid that assessment or those two assessments;

That as far as he knew there was but one Rosene subscription on behalf of defendant in plaintiff company.

Defendant admits it hasn't paid anything on the assessments.

Witness excused.

E. J. MATHEWS, recalled on behalf of plaintiff, testified:

Was president of plaintiff from about July 1908, until some time in January 1910; during his incumbency in that office never received any notice of repudiation of this subscription in suit from defendant.

Cross examination.

Never considered that defendant had repudiated it before he had any connection with plaintiff; knew that defendant claimed they had repudiated it.

Witness excused.

A. H. KELLOGG, recalled on behalf of plaintiff, testified:

He was custodian of plaintiff's record since he was secretary; elected Secretary in January 1910; during his incumbency in of-

fice of Secretary did not know of more than one subscription to the plaintiff's capital stock by defendant, the one in suit.

(Witness shown Exhibit E-2 attached to New York deposition of Edwin A. Pierce.)

That is the subscription he had reference to; as being the only one by defendant.

Cross Examination.

Was elected Secretary in January 1910. Records and everything (of plaintiff) were sent out here prior to that.

Witness excused.

CHARLES A. McMASTER, recalled as a witness for plaintiff, testified:

That he was requested to bring with him the record on the minute books of defendant showing the details of assets of defendant appearing on the balance sheet of April 1, 1907, which have been appraised and the values adjusted under the authority of the trustees and that he had that record; that it appeared in the minutes of the annual meeting of the stockholders held on 27th April 1908; details of assets of defendant appearing on balance sheet April 1, 1907, which had been re-appraised and values adjusted under authority of the trustees; that he found the investment of the plaintiff there; defendant's interest in the plaintiff; value, as of April 1, 1907, $125,000; value, as of December 31, 1907, $62,500; the difference between those two appraised values, entered there as $62,500 charged to surplus, half of it charged to surplus, but the trustees appraised it on April 1, 1907, at full value;

(Witness reading record:)

"Detailed assets Northwestern Commercial Company, appearing on balance sheet April 1, 1907, which had been reappraised and values adjusted under authority of the trustees;" re-appraised, valued December 31, 1907.

That minutes of regular meeting of Executive Committee (of defendant) 18th of September 1907, had no reference to John Rosene, to action taken by the Executive committee upon (defendant's) president, nothing in those minutes touch upon that matter, on that date.

Cross Examination.

That the annual statements which he had referred to, were made up by compilation of assets and liabilities, and balance made; could not say off-hand without examining the books that those statements in books of defendant anywhere showed any lia-

bilities on an unpaid subscription to plaintiff; that as to how long it would take him to ascertain and answer whether in those statements which have been testified about, was contained or purported to contain a full statement of all the assets and all the liabilities, there is shown any liabilities or unpaid stock subscription to plaintiff owing by defendant, that he could look through the records and answer that question possibly by the time you (court) reconvened.

(Witness excused.)

Plaintiff thereupon offered in evidence the records and minutes of the special meeting of the board of directors of plaintiff held on April 19, 1907, at which a majority of the board were present, and at which the following proceedings were had, among others, the matter of the appointment of an executive committee as provided by the by-laws, as follows:

"Resolved, that the board of directors designate three of their number to constitute an Executive Committee who shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation, including the power to authorize the seal of the corporation to be affixed to all papers which may require it; which said committee shall regularly report at each meeting of the board of directors; all matters and things theretofore done or performed by it respecting the business and affairs of the corporation.

The following directors were unanimously designated as members of the said Executive Committee: H. C. Davis, A. A. Housman and Caleb Whitehead.

On motion of Mr. Davis, seconded by Mr. Housman, it was unanimously,

Resolved, to abolish the office of managing director of the company and that said Mr. John Rosene be relieved of his powers and duties as such managing director to take effect May 1, 1907, and that Mr. Rosene be notified to that effect and be requested to make a full and complete report of all matters and things done and performed by him up to the date of termination of his office."

The plaintiff thereupon tendered to defendant in open court certificate of preferred stock and certificate of common stock of plaintiff's capital stock, share for share, for the unpaid part of defendant's subscription and the same were lodged and filed with the Clerk of the Court.

Thereupon it was agreed by counsel for the respective parties that all the by-laws of plaintiff and the original and supplemental

agreements between plaintiff and John Rosene and all proceedings had since the organization of plaintiff and all minutes to which reference was made are in evidence.

Thereupon it was agreed by counsel for the respective parties, that all the exhibits attached to the depositions read in evidence, and offered in evidence, subject to objections as made by defendant.

Thereupon the deposition of witnessess for plaintiff as read in evidence, were offered by plaintiff, and received in evidence subject to the objection interposed by defendant at the time the depositions were made.

Thereupon, plaintiff offered in evidence the written stipulation of the parties consenting to the opening and publishing of depositions and waiving transposition of technical title of commissioners before whom the same taken.

Whereupon plaintiff rested.

Thereupon the defendant challenged the sufficiency of the evidence of the plaintiff and moved for a non-suit on the ground that the evidence introduced on behalf of plaintiff was not sufficient to warrant a verdict against defendant.

Ruling upon the challenge and upon the motion for a non-suit reserved by the court.

DEFENDANT'S CASE. Thereupon defendant called

JOHN J. HARTMAN, a witness for defendant, without prejudice to its challenge and motion for a non-suit, plaintiff consenting, who being sworn testified as follows:

That he resides and had resided in Seattle a little over twenty year; his business, Attorney, practicing in Seattle all the time had lived in the state, twenty-five years; that he was attorney for defendant in 1906, and one of the attorneys in 1907; was not at all his custom, as attorney for the defendant, to attend the meetings of the board of trustees, unless requested to be present; attended occasionally when requested; attended the meeting of the board of trustees some time in April, 1906, when the question of the subscription made by Mr. Rosene on behalf of defendant to the capital stock of plaintiff was under discussion; that he thought he was requested to be present by Mr. Treat, one of the trustees, as he then recalled.

That there were present at the meeting: Mr. Rosene, Mr. Trenholme, Mr. Thomsen, Mr. Treat and Mr. Greenough, Mr. Trimble, Captain Jarvis and in fact all of the trustees, he thought, except Mr. Hogan and Mr. George Williams; didn't know that he mentioned them all but he thought they were all there except those two.

Mr. Jarvis and Mr. Trimble and Mr. Greenough are dead; the survivors were Mr. Rosene, Mr. Thomsen, Mr. Treat and Mr. Trenholme, and Mr. Hogan whom he didn't think he had seen, but he (Hogan) never met with the board that witness knew of; he was an eastern man, a New York man; didn't think he ever met with the board;

That the principal matter for consideration, at that meeting, was acts of Mr. Rosene, president of defendant, in subscribing for shares of stock of the par value of $250,000, he thought, in plaintiff, Northwestern Development Company, now known as Maine Northwestern Development Company and to take action as to whether that would be ratified or not by the board; there was some other matters, but that was the principal thing that was under consideration for which that meeting was called, Mr. Rosene just having returned by way of San Francisco from New York and the east.

That he was asked to be present to prepare a resolution or motion which probably would be passed as indicated; the discussion, he thought, started by Mr. Treat who was at least one of the aggressive members of the board on that matter; the question was discussed back and forth; Mr. Rosene insisted that it was a good investment and that the company ought to take the shares of stock, while all the members—not all possibly to start with but finally—were opposed to taking the shares of stock or having the subscription, and after a considerable discussion, a resolution was passed, on motion, declining to take the subscription or stand for the subscription as made by Mr. Rosene and repudiating the acts that he had attempted in the subscription which he had made; a memorandum of the affairs was taken by witness and, he supposed too, by Mr. Trenholme; he had expected to prepare the record in proper form with due reference to the facts as they existed; and then Mr. Rosene pleaded with the board to not make a record of the matter in the record books because, he said, that even if the board did not think the property valuable or the prospects valuable or the investment valuable, there was plenty of people who did, and he would have the Company entirely relieved from what he had done and others would take the entire subscription; would return the $50,000 to the Treasurer which he had paid and that the Company would not have any obligation out, and if a record was made and the matter was talked about it would lessen his chance of correcting the situation and relieving him from much embarrassment because he would make good by having others take the stock which had been set aside under that arrangement. That witness was interrogated as to whether it was necessary in order to make it binding, to record it on the books, and he notified—he made a memorandum—he made notes at the time of the affair and as it was determined not to make any record in the book he threw those away at that meeting and he didn't think Mr. Trenholme was taking notes because it was wit-

ness' place to do that and he usually did when they were at such meetings—and it was not kept—so the matter is purely oral so far as it finally developed; that he was interrogated by members of the board as to whether the fact that the action which they had taken was not put down on the record would be binding and would hold good, and he told them that the record in the book was only a matter of preserving what was done; it was what was done that bound and counted, and they had acted and that made it binding and final providing they would give information to the members of the plaintiff and Mr. Rosene, the chairman, plaintiff's board, was there;

Witness thought, he, Rosene, carried his capacity of chairman of plaintiff's board with him; that he was acting in his double capacity there; witness knew so.

That Rosene was chairman of the board of plaintiff at that time and he talked for both parties as he would have been an honorable man and would do.

That Mr. Rosene put the motion that was made; there was no dissenting vote unless it would have been Mr. Rosene; he, Rosene, would oppose it but he did not vote; that there was no dissenting vote as witness recalled it; in fact the board were unanimous on that, and Mr. Rosene was consenting; he wanted to get a way to get out and save himself and not embarrass the defendant.

Witness had no personal notice or knowledge of any notice that was given to the officers of plaintiff of that action more than his suggestion or suggestion to the officers of defendant to notify them; only knew from hearsay otherwise so that would not be the best evidence; he instructed them to notify in some way the officers.

Witness thought he was present at the meeting of the board (defendant's) on September 5, 1906; that was when they finally decided to take, well, witness asked to see the minutes because he could not recall it from memory, if that was, what was done, he could tell.

(Witness shown minute book and his attention called to minutes of meeting of defendant's board of trustees on September 5.)

That he was present at that time; he thought he drew that resolution; there was discussion in the board at that time; Mr. Rosene had not succeeded, from witness' knowledge of the account book of defendant had by looking at them and talking with the bookkeeper—witness did not make any entries but got it from the cashier in the office, and he knew the general accounts and the action taken by the board and what they found and what they re-

ported on—witness was not a member of the board—but what was done—.

That the $50,000 that was paid in the first instance and which was to be returned by Mr. Rosene under the suggestions and talk in the April meeting, had not been, and more money had been paid to plaintiff: witness thought it was on account of freight bills and goods sold up at Nome and things like that;

Witness knew from the books and from the statements of officers how that was paid;

That it was stated at the meeting by the directors who were there, including Mr. Trenholme, who had general supervision of all the accounts at all times, that, in addition to the $50,000, $75,000 or thereabouts more, as he recalled, had been added, had been taken out of defendant's treasury and paid to plaintiff and that they did not see their way clear to get that money back and they had better settle it by taking shares of stock to the amount of $125,000, as that would be a plan which would settle the whole thing and make everybody agreeable in both companies to settle it that way. That was the general plan on which they proceeded and then a resolution was passed to take those shares and pay for them—the payment having already been made as stated.

Witness was present at the meeting of (defendant's) board April 10, 1907, that is the one that refers to this, and drew that resolution, drafted a formal notice of the action taken by the board.

(Witness shown letter marked defendant's Exhibit No. 3.)

That is the letter which he wrote or the action which he took in pursuance to the requirements in the resolution of the meeting of April 10, 1907, where he was directed as attorney for the company to prepare certain information and data; it was delivered to Mr. Rosene on that day, or possibly the day following, should say on that day; witness did not see him mail a letter; did see him talk with the president of the plaintiff about the matter.

Mr. Henry C. Davis of New York was president of plaintiff at that time; a partner of the firm of A. A. Housman & Co. Witness thought he saw Mr. Trenholme, secretary of defendant, talking with Mr. Davis, president of plaintiff, with respect to this notice, at different times when he was here in the summer of 1906, and it was witness' recollection, also in the spring and winter of 1907, he (Davis) was around here quite a good deal, for quite a good while; was not sure but what he (Davis) went to Alaska; didn't know about that.

That Mr. Davis, president of plaintiff, was in Seattle within a very short time after the action of the board of defendant in April,

1906, would say within a week or so if not when the action was taken; witness did not have any conversation with him to ascertain whether he had knowledge of the action of the board in repudiating that assessment.

Cross Examination.

Had been acting for defendant as its counsel when he attended this meeting of its board in April, 1906, since its organization in 1899, seven years; attended this meeting in April, 1906, he thought, at Mr. Treat's request, as he stated before; Witness was at the meeting during its entire sitting; was there during the whole period, during the entire sitting; at that time he had a few shares in the defendant; ten shares, he thought; had never been a trustee; object of his being present, as he stated, on request of Mr. Treat, that important action would be taken over some things done, and they wanted him (witness) to draw the resolution of the action which they would take; cannot say what was in his (Mr. Treat's) mind; he apprehended that he (Treat) had discussed the matter with other members of the board, because it was getting pretty warm about this action taken before the meeting—witness apprehended so—he was guessing; did not know what was in his (Treat's) mind.

Said he didn't know that Mr. Treat could know or could have known what would be the action of the board; he (Treat) probably could anticipate, as he evidently had been talking this matter over before they came in session;

Witness thought this matter was known to Mr. Treat that morning, probably, of the meeting; didn't know, couldn't tell. Counsel was asking him for an answer and he was giving it to him as best he could; he would tell counsel the truth.

Didn't think Mr. Treat was Vice President; It was witness' habit to meet the board at the request of any trustee that asked him to come; not to bring a resolution with him, written out or a form of motion written out.

Had never advised this board of the necessity for the protection of its stockholders the necessity of making permanent record of their transactions as a board; didn't think that question was ever asked him before this meeting came up; didn't say that Mr. Trenholme did not make any memorandum in writing during this meeting, didn't mean that; if he did he wanted to correct himself; said he didn't think he (Trenholme) made a memorandum of this resolution because he (Trenholme) knew witness was drawing that up, but he (Trenholme) was making his memoranda as he always did;

Didn't know he (Trenholme) did not make any memorandum of the resolution; because witness did not sit by him; witness was

in another part of the room; witness said he didn't know, saw him (Trenholme) have papers before him and appeared to be writing at times but what he made—what memoranda he made witness didn't know because he did not sit by him and could not see from where witness sat.

Witness took notes of this particular matter—thought there were other matters transpiring at the meeting at that time; took enough notes so as to draw a resolution; did not draw the resolution, as he stated, as they decided not to make any record of it, did not go any further.

Did not, upon his own motion or invitation decide not to put his notes into form of a formal resolution—it was the board that decided they would not put it on the books, provided that the matter would stand, and they did not put it on the books;

That the board was unanimous in their conclusion that they did not need to put the matter on the record in order to have it binding; that unanimity was expressed, upon witness taking the responsibility, expressed by the board, by the common consent of each one talking about it; did not want the jury to understand now that it was the individual talk of each trustee and that from that individual talk he drew the conclusion that the board were unanimous; that the fact was the board were unanimous; by unanimous consent they agreed to that, collectively, talk all around; possibly by talking all around that was the way they agreed to it; that was a legal conclusion; that he would tell counsel what occurred, was trying to tell counsel what occurred. That he said to counsel that he took notes of what should be contained in this resolution and after their deciding not to have it written out; he didn't retain them.

After they decided not to have them written out, he threw them away, that was what he stated and he affirmed it again. That there was a difference between preserving a memorandum of transactions in some written form and the spreading of that memorandum upon the minute books of the corporation, witness recognized that distinction, one is written down and the other you have to remember. That he understood that the memorandum could be preserved without spreading it upon the minutes. That possibly the determination of the board not to put it on the minutes, had no reference to the preservation of the memorandum; possibly he ought not to destroy it; that is a legal conclusion and therefore he could not tell counsel, was not drawing legal conclusion. That he said a motion was regularly put by the president of this board presiding at that meeting repudiating this subscription, the form of which in effect was, as nearly as he could recall that in view of the fact that the president, as the board viewed it, had acted beyond his

powers, the attempted subscription to the shares of stock of plaintiff would be repudiated and not binding upon the defendant, or words to that effect; may have been stated more briefly or more fully, he could not say exactly, did not remember the words verbatim; thought it was Mr. Treat who moved the adoption of that motion; his memory did not serve him which one seconded it; and therefore after a good deal of discussion, the President put the motion and the trustees voted on it; that he made a little memorandum of it there, as he stated, and then when he left the room or some time he just threw it away, he did not keep it.

(Witness was asked if he did not think it was advisable to keep a permanent record of the transactions of the board upon an important matter involving $125,000, particularly after the board had determined not to spread it on the minutes.)

Answering that now, it did not impress him of so much importance because of his belief that Mr. Rosene would be able to get the money back and relieve the company entirely from what he had attempted to do; he believed that he (Rosene) would do it and it seemed like a mere formality and his (Rosene's) explanation was made and when he (Rosene) found they did not want to go on, he (Rosene) would have it placed in another way entirely.

Believed that, at the September meeting of defendant's board, Mr. Trenholme was present; Mr. Trenholme had supervision over the accounts of the defendant at those times;

Had not heard his (Trenholme's) testimony that morning with reference to that, was not here (in court) when he (Trenholme) testified; didn't hear his testimony, said he was not here; Didn't know that he (Trenholme) reported at this meeting in witness' presence; it might have been the treasurer, Mr. Treat, as witness remembered—or they had something pending—witness knew there was a lot of freight involved at one time there—that he had had the impression that they had a large freight item and stores sold at Nome; because the defendant ran a store at Nome—the defendant, as he recalled, sold merchandise to plaintiff that was operating up in Alaska and they were not paid for it over the counter and this became a matter of debit and credit and the plaintiff had obtained from the defendant a considerable amount of value in the way of freight on goods that were sent up by itself and merchandise they bought and other things, as he recalled the circumstances now.

That, he believed, would put them in debt to the defendant, if they bought and did not pay cash over the counter.

(Witness was asked did he know of his own knowledge that the credit for any of those sums of money on this sub-

scription was made in order to offset anything plaintiff might have owed for the purchase of stores at Nome.)

No he did not know how the matter was adjusted, that was a matter for the auditor; didn't want to just admit it (that he didn't know anything about it at all) altogether just for counsel's sake. Thought he knew something about it. Did not know that defendant paid plaintiff a balance in a check of $32,000 in October. Had heard the testimony of Mr. Ford, heard Mr. Ford so testify. Witness denied that he said that in this September meeting 1906, Mr. Trenholme advanced the proposition at the board or before the board that in as much as there was $125,000 paid at that time upon the subscription and they did not see any way to get it back they ought to let it go and let it stand, did not say that. That he had said there had been obtained either in credits or advances including the $50,000 paid by Mr Rosene in the first instance, by the plaintiff something like $125,000 and he thought that Mr. Trenholme made the statement, might be mistaken as to the officer that made it—he had said that before and he stuck to it; that was his recollection, Mr. Trenholme gave the information; Witness hadn't on direct examination, also advanced the fact that Mr. Trenholme had stated that they did not see any way to get the money back and they had better settle; didn't think that was his testimony exactly; thought he had said there was a difference and there was a dispute. Didn't know of his own knowledge whether there had been $125,000, paid on or before September 5, 1906, upon this subscription, because he did not pay it.

That the general knowledge he had of the books was all sufficient, as he had faith in the statements made by the officers of the company to make him think that was the fact.

That all he knew was what they told him—that he didn't keep the books.

Was under the impression now, his recollection of it was now that those accounts were brought before the board at that or—he thought at that time—as he remembered. That Mr. McLaren, if he recalled, was the Cashier and worked on the books. Witness thought he was the one who came into the meeting, as counsel brought it up further, witness thought Mr. McLaren finally came in to verify some of those things and, he thought, went over them with the books; as he stated a while ago, he might be mistaken about the time that he was getting the information as to when the whole $125,000 was paid; he had said before it might have been in 1907, but he thought it was during the fall of 1906; it might have been at the April meeting of 1907 when this thing was gone over. That he drew the resolution which he said authorized the subscrip-

tion for $125,000 which was adopted at the meeting of the defendant's trustees in September, 1906; he had so stated.

(Witness was asked upon what he based his resolution so far as the amount was concerned, and why he did not draw it for $75,000 at that time, which was the amount which had been paid up to that time.)

That he did not know that was the amount; he had only counsel for plaintiff's statement for it and that was worth the same as his own; his understanding, as he had told counsel, was that that was the amount of the incurred or the incurring liability—obligation—and he thought it was $75,000—for matters advanced, as he stated before, and the $50,000 that Mr. Rosene paid; but the books would show that but he didn't give that as the fact, only his recollection, as counsel was, that he would put it the other way, counsel wanted the fact as far as he recollected it and he would put it that way; he had given the fact so far as he recollected it.

That he thought, probably, he also prepared the resolution which was adopted at the same meeting September 5, 1906, by defendant's board of trustees directing the stock held by defendant in plaintiff should be disposed of down to $50,000;

(Witness was asked: Why, so far as he could learn from the discussion that took place, why they desired to authorize the subscription for $125,000 when at that time there was only $75,000 which had been paid, and then on the subscription for $125,000, ordered a resolution down to $50,000.)

That the whole thing was a disagreeable mix-up and it had caused ill feeling; that he was not drawing conclusions, was answering facts; that the board looked on this subscription they had gotten into a disagreeable frame of mind and they wanted finally to "give and take" and get out of it the best way they could. The members of the board felt that the President had not treated them right and he (the president) felt that he had and there it went.

(The following question being there put to witness:

"I know, but Mr. Hartman, their ledger shows that this Company had at that time paid $75,000; now if they were anxious to dispose of their holdings in plaintiff down to $50,000, why not reduce it from 75 to 50 instead of lifting it up to 125 and then bringing it down to 50."

Witness answered:)

"Ask the board, I don't know."

That he was at that meeting; that he was telling counsel what they discussed in his presence; what transpired at previous meet-

ings he didn't know; that he had said at what previous meetings they had reached their conclusions he didn't know; they could have acted and not had a record; they had many conferences that he knew of on things, many, many of them.

(Witness was asked from what he knew of the action that transpired at that meeting and the discussion that was had between the trustees, he did not know from their statements why they authorized the subscription for $125,000 with only $75,000 then paid upon the one that was reported and then reduced it to 50.)

That he would answer it again, he had three times. It was a disagreeable matter for them; that was the way they talked about it and they wanted to get out and be relieved of the situation and the discussion and the embarrassment and the entanglement, and with as little loss as possible.

That he presumed that resolution expressed in toto the desire of the board with respect to the subscription of defendant to plaintiff's stock, he couldn't say—that he embodied what, as a lawyer, he thought carried out the transactions as it was transacted that day before the board, as he understood the action; that he put in every element that had any bearing on the question so far as he had remembered it.

That he believed that that (authorizing the president to subscribe to the plaintiff's preferred stock in the sum of $125,000) was what it said—the resolution spoke for itself; if he had it before him he could give counsel an opinion, if counsel wanted it. Didn't think his opinion was worth anything though, or that, it was the fact counsel wanted.

(Counsel then read to witness from minutes of defendant's board meeting of September 5, 1906, as follows:

"The question of Mr. Rosene's subscription to the stock of the Northwestern Development Company was fully discussed.)

That he presumed that referred to the subscription he, Rosene, had reported in the April meeting.

(Counsel, continuing reading:

"And Mr. Thomsen introduced the following resolution".)

That counsel was badly mixed (in asking witness that he remembers it was Mr. Thomsen now instead of Mr. Treat); he had

said Mr. Treat introduced the resolution that was not recorded, witness had never discussed that resolution with counsel.

(Counsel, continuing reading:

"The question of Mr. Rosene's subscription to the stock of the Northwestern Development Company was fully discussed and Mr. Thomsen introduced the following resolution: Resolved that the president be authorized to subscribe to the stock of the Northwestern Development Company for this company in the sum of $125,000."

"Mr. Thompson moved the adoption of the above resolution and the same being seconded by Mr. A. J. Trimble, the same was put to a vote and unanimously carried.")

That he thought he prepared that resolution; as a lawyer for the board, at their request and it was adopted, to settle that tangle that they go into, understanding that that wiped the slate as between the companies; that was what the fellows said and he heard; that was not (witness') conclusion — the understanding was right then to the effect that this would wipe the slate, if counsel might pardon that expression, between the parties and settle the differences;

That he did not say a minute ago that there was not any conditions attached to the subscription. That what was said (at that board meeting) by the different members was that this was and had been an embarrassing matter, as witness stated before; that there was some feeling and that if they made a subscription for $125,000, the differences then going on between the two companies would be settled on that amount and there would be no further difficulty between the parties. That, to use the expression, that would wipe the slate; that in that way the matter could be ended which was then disturbing the officers of the two corporations and the two corporations and it was sort of a compromise settlement or arrangement finally in the interest of peace and harmony—that was as he remembered it; that Mr. Rosene was there and presided; that, as the examination (of witness) has gone on, he would say that probably this resolution was a little too brief to express all that was contemplated, understood or done when the board acted on it;

Witness did not understand, as a lawyer, that in the resolution of the board, all their previous understandings are merged in that action; that he didn't understand this as counsel stated, that he drew the resolution and probably as it then came up and as he understood what counsel said, he did not put in all he ought to have put in, and they adopted it the way he drew it, thinking that it did cover it;

That he had stated three or four times he thought there was other things that they did, bearing upon this resolution; giving the reasons for it and why it was done; that he thought the word "compromise" ought to have been in there; it would have been better, but it was not; it was a compromise arrangement believed to be for the interests of all the parties and was so stated and recorded and acted upon in that way when they voted on this resolution.

(Witness asked by whom it was so stated, answered:)

That he thought they all talked; they did as far as he recalled; that Rosene talked about it, he was pleading for harmony and to get on a basis where there would be no more ill feeling and there had been some considerable.

Didn't believe that Rosene ever cast a vote because usually when an action was taken, there had been considerable discussion and if there was likely to be differences on the final end, as a rule everybody voted for it, and if they did not have a full vote, action would not be taken. They were men who were not afraid to express their opinion before they voted.

That he thought if he had anticipated then what he knew now he would have elaborated that into perhaps a page, because he didn't think of any lawsuit, he didn't usually—he would have given some preambles and whereases.

That the meetings of the board were held usually in Mr. Rosene's office, which was in the front corner of the Lowman Building, they having a floor and in the northeast corner of the room was Rosene's roll top desk and immediately in front of and to the west a little running off that, was a table, say eight feet long, and they would have chairs on the further or westerly side of that table, round the end of it and toward Mr. Rosene; he was usually at his desk, and if they had a full board they could not all sit in that place there; sometimes some of them would be off on a big sofa in the south end of his room;

That he thought Mr. Rosene actually presided at that meeting. Didn't remember anything to contrary. Witness had said that Rosene was present at the April meeting in the capacity as chairman of the board of plaintiff; That he (Rosene) so announced himself; in fact witness thought that was the first he knew that he (Rosene) had this position; he (Rosene) told them about it and he was there he (Rosene) said he represented both companies' business and he talked about it and told us he would correct those things and he had some power and authority; Witness didn't think he knew what his (Rosene's) official connection was; knew he (Rosene) was connected with the Company.

Witness' recollection was that he (Rosene) did try to impress on all of them and witness got the impression that he was likewise —could act by virtue of his position as chairman of the board of directors of plaintiff; that was the impression witness got from what he (Rosene) said and witness thought that was true. Counsel would have to ask him (Rosene) when he came on the stand; he (Rosene) could tell counsel more particularly;

What might have been in Rosene's mind would not cut any figure at all, but what he actually stated and if witness was there he heard it.

(Witness was asked, did Rosene state he was there in his official capacity representing plaintiff; answered.)

That he couldn't make it any more clear than he had said heretofore two or three times.

Witness did not say that he meant in his (Rosene's) person and nature, his outward garments, he created an individual that was in fact the president of one company and the chairman of the other, and counsel knew that he didn't. Counsel knew that witness said Rosene was there—he was there—he was chairman of the board and witness thought he Rosene, said he could act for that concern and would act or something to that effect and he would straighten all this up—could represent both of them now and they would listen to him or something to that effect.

Witness thought he was Rosene's attorney then, his personal attorney; that Rosene did not have any private business that witness could recall—it was all company business.

Witness advised him from time to time if he needed advice—witness thought witness had a little case that somebody sued him, no that was before this time; witness didn't remember that Rosene had any private matters but if he did he probably would advise with witness; witness had his confidence.

Thereupon counsel for plaintiff desired to correct an error that he made at the time he rested, that no prejudice had been done to defendant; he desired to call for the notices of assessment that were in the order of the court to produce. Counsel for defendant stated they would produce them at the next hearing.

Thereupon counsel for plaintiff requested leave and leave was granted by the court to make the following correction:

To correct a date in the sixth paragraph of further reply to fifth affirmative defense, from year 1910 to 1907;

To correct the figures in paragraph seven of amended complaint and in paragraph six of the reply from 500,000 to 499,-

989, and same correction in paragraph four of reply to fifth affirmative defense of answer. To further amend plaintiff's reply by admitting the allegations of defendant's amended answer that the alleged subscription referred to in the amended complaint was delivered to the plaintiff.

Witness HARTMAN desiring to correct his testimony stated as follows:

"When I stated that Mr. Trenholme had general supervision of the accounts, I should have stated M. M. Perl, the auditor. The two men would both be before the board, and it had been a good long time and witness got a confusion of the two different men and the positions they held. Perl was the auditor and general bookkeeper."

Witness excused."

Thereupon defendant offered in evidence the by-laws of defendant contained in the book which plaintiff had already introduced in evidence as the minutes of defendant.

Thereupon plaintiff, agreeable to time granted to it for that purpose, tendered in court to defendant certificates of stock for 25,000 shares of the preferred stock of plaintiff issued in defendant's name, and 25,000 shares of common stock of plaintiff, issued in defendant's name, dated November 24, 1915, as the date of the issue, tendering them in proof of plaintiff's allegations in its amended complaint of its readiness, willingness and ability to comply with the subscription contract and as an offer to comply with the subscription contract upon payment of the money; that the certificate of the common stock is part of a number of shares which was included in certificate number G-101, issued in the name of A. A. Housman & Company for 160,099 shares, which was part of the original deposit; certificate G-101 having been cancelled and this issued in lieu thereof and the balance put in the balance certificate.

Certificate as tendered ordered filed in the cause by the court.

Thereupon defendant renewed its offer as evidence of the by-laws of the defendant, counsel for defendant stating that the by-laws were amended in 1907, but not in any particular referred to in 1906, at the time which defendant wanted these to have reference to; they were exactly as they appear on page 10 of this minute book; and particularly offered Article 3; also Section 6 of Article 7, also Article 9. All of which were received in evidence and read to the jury.

H. W. TREAT, called and sworn as a witness for defendant, testified:

That he resided in Seattle, had resided there 10 years; was in 1906 a stockholder of defendant; in March, April and May 1906 was a trustee of defendant.

The board of trustees of defendant did finally authorize Mr. Rosene, the president of that company, to subscribe for stock in the plaintiff company;

(Witness asked if prior to 5th September 1906, the defendant's board ever authorized Mr. Rosene to subscribe to any stock in plaintiff company, answered:)

That he should have to see the minute book before he could answer,

That the defendant's board of trustees, at any meeting attended by witness, did not authorize Mr. Rosene to subscribe for stock in plaintiff company, prior to the board meeting of September 5, 1906.

That witness attended the meeting of the board of trustees sometime in April 1906, after Mr. Rosene returned from New York, when the question of the subscription he had made to the stock of plaintiff company, came before the board.

That he remembered that Mr. Thomsen, and Mr. Trenholme and he thought Captain Jarvis were present at that meeting; that it was his recollection that Captain Jarvis was there; he would have to look and see; he remembered Mr. Thomsen and Mr. Trenholme was there and Mr. Rosene; he remembered that Mr. Hartman was present, he was there; knew how Mr. Hartman came to be there, at whose request; that witness asked him to go to the meeting;

That they learned that Mr. Rosene had organized a company in New York and that he had tried to connect them with it in some way, and their impression was that they did not want any interest in it, because they had all they could attend to and they prepared themselves to put themselves in a position to resist any connection of their company with the other one, as far as any investment was concerned; that was why witness happened to have Mr. Hartman down to put the matter in legal shape, where they would be outside of it.

That at that meeting they passed a resolution that they repudiated Mr. Rosene's subscription; didn't remember who introduced that resolution; witness might have; thought perhaps he did, was not sure, thought so though. That every body was in favor of

it and it was carried; Mr. Rosene then said that the stock had been over-subscribed in New York and it would be much easier for him, and it would keep him in better standing with his associates, if they did not take any action which would reflect upon the subscription, and begged them not to do it and assured them that he would let the people who had subscribed in the east take the stock in their stead, and asked them for that reason to leave it off their record and not to make any permanent record of it, and they consented to it, thought that would be the simplest way out of it, so that it was not put on the record.

That they talked it over with Mr. Hartman at the time and he said that would be perfectly all right.

That he would not tell when the next time was that the matter of that subscription came to the attention of the board without looking.

That September 5, was the next time that the question of that subscription came before the board;

(Witness' attention called to the minutes of that meeting, as follows:

"The question of Mr. Rosene's subscription to the stock of the Northwestern Development Company was fully discussed and Mr. Thomsen introduced the following resolution: 'Resolved, That the President be authorized to subscribe to the stock of the Northwestern Development Company for this company, in the sum of $125,000.' Mr. Thomsen moved the adoption of the above resolution and the same being seconded by A. J. Trimble, the same was put to vote and unanimously adopted."

Farther down in the minutes:

"The following resolution was introduced by Mr. Thomsen and seconded by Mr. A. J. Trimble and unanimously adopted, namely,

"Whereas, it was necessary to provide funds to build or purchase additional steamers for the Company's use;

Resolved, That the President be instructed to sell or dispose of the stock held by this Company in the Northwestern Development Company down to $50,000," and witness testified:)

That he remembered those resolutions;

(Witness was then asked:

"State what took place before the board at the time when those resolutions were adopted."

Counsel for plaintiff objected to the question on the ground of incompetency, objection overruled by the court, and an exception to the ruling of the court was taken by plaintiff and allowed by the court, whereupon the witness testified:)

That they had a general discussion and looked into the accounts of both companies and found the Northwestern Development Company owed the Northwestern Commercial Company such an amount for freight and supplies that if they were to settle upon a $125,000 sum it would merely square the account and make it satisfactory to both companies and start over again, as it were; so the transfers were made. There had been some transfers made in the books without coming up before them—he didn't think there was any cash paid for any of this stock; he thought it was merely a question of bookkeeper's transfers and journal entries; that he was the treasurer at that time; that there had not been any cash payments on this Rosene subscription that he knew of; he never knew how it was paid for. All of those things came up at that time. They found that there had been entries and cross-entries and credits and debits, and that by making it $125,000 subscription they could nearly square the accounts, and it would seem to be the proper thing to do—a compromise arrangement—and that resolution was passed; that Mr. Perl, who kept the books had made those entries which witness spoke of on the books; that he thought Mr. Perl was dead, he didn't know, some one had said so here (at the trial) the other day; he didn't know it before.

Cross examination.

That it was his recollection that he offered the resolution in the April meeting; that Mr. Rosene did not vote—he was in the chair; he did not vote against it; he made no indication, so far as witness could recollect, of voting one way or the other; that he (Rosene) did not offer any protest against it until after it had passed, and then he made this plea to the board not to put it on record; that he (Rosene) put the motion; as chairman; that Mr. Trenholme was secretary of the company and, he imagined, secretary of the meeting;

That witness thought it was the custom for the secretary to make memorandums of the meeting and afterward write them down in the book and have them signed by himself and the president.

That he supposed Mr. Trenholme would make those memoranda but Mr. Hartman had drawn up the resolution because we wanted it in proper form; that Mr. Hartman had not written this resolution before he (Hartman) arrived there; while he (Hartman) was there, witness asked Hartman to prepare it in the proper form as he wanted to put the motion to repudiate that stock beyond any question; witness had said he wanted it put in shape so that there would be no question about it; he therefore directed it and Hartman wrote it; they had it in the proper shape in any case, because they were very much excited and afraid they were going to make a loss, and it was a large amount and they did not want to take any chances; that was the way he looked at it; as a matter of fact it was in definite, concrete form at the time it was offered; and was read to the board, as a board, before the vote was taken, so that they all might know definitely and concretely what they were voting on; that he didn't know what became of the resolution paper; he heard Mr. Hartman say on the stand he (Hartman) had destroyed it; witness never knew, he never paid any attention to it, he supposed Hartman kept his memorandum;

He didn't hear Mr. Hartman say on the witness stand that he (Hartman) drew that resolution in concrete form, witness knew that Hartman did because witness required him to do it;

After the motion was put and carried Mr. Rosene requested or begged the board to leave the matter off the minutes, not to make it a matter of record;

Rosene said: "If this goes into our minutes, or into our meeting, it might be misunderstood by the people down east and they might not think this is the good thing that I know it to be and you don't know it, and they want it and they are satisfied with it."

Witness didn't know how the people down east would know anything about their minutes; he thought it would make a little difference, whether the resolution was on a separate piece of paper among the files of the secretary's office or incorporated regularly in the minutes of the board, so far as the people down east were concerned; for instance plaintiff was bringing all these records into court today and reading this minute book and rereading it, that showed how easy it was for the regular record of the meeting to be known to the public.

(Witness was then asked: "Then that was the more reason it should go on the record—the honest records of the transaction—of the board," and answered;)

That he was not a lawyer.

(Witness was then asked: "You would not have to be a lawyer; that is a matter of business and good morals" and answered:)

All right. That witness thought he was the largest stockholder at the time, as a matter of fact.

That it was agreed to leave the matter of the resolution off the minutes; that was not by a vote, by common consent; the secretary or whoever was keeping the record there understood that it was not to go on the minutes; that he thought he read the resolution that had been prepared, not the chairman; that he could not recollect what became of it after it left his hands; he supposed he put it down on the table; they all sat around a table like that at those meetings; he was sure he didn't know what became of it; there was no motion made to leave it off the record;

That he said he was present in September 1906, at a meeting when a resolution authorizing the president to subscribe to $125,000 shares of the preferred stock of this company was adopted; and the resolution authorizing the disposal of the stock held by defendant in plaintiff to reduce it to $50,000;

That he did not say that the books were brought in and he made an examination of them; he said they talked over the amounts and that they called in the accountants and found that there had been credits for freight and for Nome stores and so on; he didn't think he examined the books personally.

(Witness was then asked: "You do not know anything about the actual amounts, do you, one way or the other," and answered:)

That he knew there was approximately $125,000; that was what was told them at that time;

That you have to take the word of your bookkeeper, that was their bookkeepers or their accountants, what they told them, if you can't depend upon them he didn't know who you could depend on; Mr. Perl told them;

That his recollection was that there was altogether about that lump sum, $125,000 one way and the other, as he recalled it, so that in their making that $125,000 subscription it would practically square the accounts.

That he thought the debt was largely for freight.

(Witness was then asked: "Then there was freight pending at that time which would absorb this, and you forgave the

Development Company the freight, is that the idea—you forgave the plaintiff company the freight charge," and answered:)

That he didn't know how to interpret that "forgave it the freight charge."

That he did not consider it no longer a liability on the part of the plaintiff company; that charges were made one against the other; if they owed us $125,000 for freight and other matters, and he thought there had been $50,000 credited to them early in the arrangement, and then there was approximately, he thought, another $75,000 due the company from them, for freight and supplies; so that as he understood it the two items then of $50,000 which had been credited to them originally on the subscription and the $75,000 which they owed for freight principally, would make up the $125,000; he thought that was wiping out the freight; he thought that was crediting them instead of charging them—crediting them with the stock and charging them with the freight; he didn't know what entries were made; there were a great many entries and cross entries, he was not a bookkeeper and could not tell; he was treasurer, but he had his man in there; witness never had anything to do actually with it, he did not do it personally; he hired a man to do the work in there as treasurer; Mr. McLarin was their treasurer;

That the defendant, as he recalled, owned one concern which was operating stores, and another which was lightering freight from ship to shore at Nome and another which owned a line of steamers which carried the freight between here (Seattle) and Alaska; that he thought those concerns were independant corporations, owned and controlled by defendant; the Northwestern Fisheries Company and the Northwestern Steamship Company, and the North Coast Lighterage Company, as he recalled, and he didn't remember the name of the store company, there was four of them.

Would not know without looking whether it was the Northwestern Steamship Company that plaintiff owed this freight to, or the defendant.

The defendant and the Northwestern Steamship Company were having business as between each other constantly; one would advance so much money to the other and had a credit for it, and so on, and so undoubtedly he would think that the way it was probably arranged was that this freight was probably charged to the defendant, if the persons who got the benefit of the freight carrying, who were under the dominance of the defendant, did not settle within a certain time, then they charged it to the defendant and

the defendant had to do the collecting for that freight, bankers for them.

They, defendant, were the mother concern, the construction concern.

That the debt, if it was charged to the defendant was not due the steamship company. If the steamship company carried goods for the plaintiff at the instance of the defendant, and the plaintiff did not pay the frtight, then the Northwestern Steamship Company could say "I will charge it to the Northwestern Commercial Company—I will charge it to you because you introduced the parties;" then the Northwestern Commercial Company would look to the other fellow to settle with him.

He could tell how the defendant could collect any money from the plaintiff for any freight carried by the steamship company, because they were responsible absolutely, the Northwestern Steamship Company had no business with the plaintiff and probably did not know them, they probably did not know them in a business way. They issued bills of lading to them for the freight but then somebody must be responsible for that freight, he would say so. If he was to introduce a man to you and tell you that his credit was good and to go and give him some moncy and after the ten or twenty days or sixty days the man did not settle with you, you would come to witness and you would say.: "You told me, why, that man was all right, and I looked to you—I didn't look to the other man; I didn't know anything about him."

That he was not sure that it was true that the Steamship Company really did not know the plaintiff and it was the defendant that was standing sponsor for the plaintiff for the freight carried by the Steamship Company, but that would be the general way of it and he presumed that was the way it was done; he did not look it up to see;

That he was trying to give counsel the facts and if counsel would listen and not be quite so impertinent he would give them to counsel a good deal better.

That when he spoke of them (Steamship Company) not knowing plaintiff that might mean they did not know plaintiff in a financial way. They would not leave it to the discretion of the Northwestern Steamship Company, whether they would give a man credit for $125,000 of freight, because, as a matter of fact, the defendant owned the Northwestern Steamship Company and they would not allow them to make any credit like that to any concern they liked.

That he thought that much credit was extended, he imagined that they carried it for them.

That he would bet a thousand dollars that they carried more freight than that for them;

(Witness was then asked: "Did you charge the freight in this ledger account against the plaintiff" and answered:)

He did not charge anything.

That, as treasurer he was not responsible for freight charges and all that sort of thing, he had nothing to do with it; didn't think he was—never felt that he was—he felt that the bookkeeper attended to all that; he was treasurer of the Company, they conserved the funds, and paid dividends every year and there was no trouble about that.

That he could not tell where the freight is charged; could not tell on that ledger account where the freight was charged, against that $125,000 that is credited to the Company on their subscription, would not want to try because he was not an experienced bookkeeper.

Didn't think he was also treasurer of the Steamship Company, didn't recall who was.

That his impression was that the larger portion of that $75,000 or of the allowance they were making in September to foot up to $125,000 as an offset to the subscription, was freight.

That he supposed that the plaintiff sent up its own supplies, principally, but there were so many things in Alaska that the people found afterward that they needed over what they would send up themselves, that he thought they bought a good deal from the Nome store—he would say the most of it was for freight though.

(Witness then shown checks, Exhibit AA, and testified:)

That he recognized the names of J. D. Trenholme and John Rosene there; that he thought those were the signatures of Mr. Trenholme and Mr. Rosene, they appeared to be; that this first check was drawn by plaintiff on National Bank of Commerce at Seattle and payable to the Northwestern Steamship Company, and he imagined they all were.

That he recognized the endorsement of the checks by an officer of the Steamship Company, Mr. McLarin, he thought.

(Witness' attention called to each of the checks.)

That these seem to be endorsed by McLarin, which would indicate that the Steamship Company got the money on those checks,

in the ordinary course of business; that they are all stamped "paid" on their face; but that was probably in excess of this other amount, that was probably what they owed more than what the other amount called for.

(Witness was then asked: "You do not know anything about that," answered:)

That he would like to bet counsel on that.

(Thereupon plaintiff offered the 13 separate checks in evidence, checks drawn between June 14, 1906, and December 22, 1906, by plaintiff upon National Bank of Commerce payable to Northwestern Steamship Company, aggregating something like $174,000, and they were admitted by the court and fastened together and marked Exhibit AA.)

(Witness was then shown expense bills on a form of Northwestern Steamship Company, a large number of them tabulated, and asked whether he recognized those as being the expense bills of the steamship company, and answered.)

That some of the other officers in the office would be much more competent to pass on that than he was.

That was the statement OK'd by M. M. Perl, the auditor of his company, apparently that was the usual way of doing it.

(Thereupon plaintiff, in connection with Exhibit AA, submitted for the convenience of court, counsel and jury, a tabulation of those checks, giving the date, number of check and amount, together with the date, footing up to $174,963.)

(Thereupon defendant admitted that these items, covered by the checks, did not go to make up the $125,000 which went to pay that stock, did not go into this account, Exhibit K.)

(Whereupon the cross examination of the witness was resumed and he testified:)

That he thought he recognized those, Exhibit BB, as the expense bills of the Steamship and the signature generally, that was in the due course of business, but he thought Mr. Trenholme should be asked about these, he, Trenholme, was the man who knew about those.

That witness recognized Mr. Perl's signature—they were the regular printed form;

That the expense bills are all signed by the officers of the steamship company, apparently they are all receipts; and the first

sheets are statements covering the expense bills which are attached to each statement, according to the shipment on the date of shipment and the vessel;

That there might have been more than one statement for a sailing;

That there was one that was not signed and that one was not, and here was another that was not and here was one that was not; here were a bunch that was not, but may be the draft covered that—he supposed the draft, though, would cover them—these were all marked "Prepaid M. M. Perl, Auditor"—that these are all apparently paid, including the one with the draft attached.

(Whereupon plaintiff offered in evidence the expense bills and receipts, as Exhibits BB, and the court thereupon reserved its ruling until further proceedings.)

Redirect examination.

That he thought Mr. Rosene had reported at their meeting in April that he had already paid $50,000 on this subscription.

That at the September meeting it came out that there had been an additional payment of $25,000 in July; didn't remember just when these facts came out as to dates, it was ten years ago and of course he had a recollection of the whole thing as it came along, but he did not recall the dates.

That the statement of account then was that including these amounts which had been paid $50,000—and the other credits which they were to give at that time—taking the indebtedness of the defendant against the plaintiff at that time aggregated about $125,000; as the business was going on all the time carrying freight as he recalled at that time and business was going on between the two companies at the time;

Did not know anything about whether the plaintiff made its clearances of its business through the defendant, its checks paid and so on; the other officers would have more knowledge of that. He didn't know.

(Witness was shown Exhibit K and asked what was the balance of the indebtedness from the plaintiff to the defendant, as shown by the last balance sheet made prior to September 5, 1906, and testified:)

Would it not be better to have one of the accountants figure them up and balance these up; there was no balance sheet there, was there?

Yes, it was balanced up August 31. It showed $57,692.22; that it looked to him like the defendant's books when last balanced prior to September 5 showed the plaintiff to be indebted to the defendant in that sum, $57,692.22.

That there had been $50,000 paid by Mr. Rosene in April and $25,000 subsequently, making $75,000 on that stock that was already credited; and those payments together with this $57,692.22 was what he understood was paying for this $125,000 of stock which they authorized to be subscribed, that was the way he recalled it.

Witness excused.

J. D. TRENHOLME, recalled, as a witness for defendant, testified:

Name was J. D. Trenholme; resided at Seattle since fall of 1899, was connected with the defendant in 1906, had been connected with defendant since its organization in the winter, about January, 1900, as he remembered it; had been a trustee of that corporation and secretary, also a stockholder.

Never held any stock in plaintiff; never served as a director of plaintiff;

Didn't think he ever qualified as such.

Never gave anybody a proxy to represent him as a stockholder at any stockholders' meeting of that company;

As secretary had charge of the minutes of defendant corporation; those minutes were written up afterward, after the trustees were in session; kept just notes from which to make his entries; after his minutes would be written up, the notes were immediately destroyed, they were not kept at all; merely a memorandum from which he could write the minutes.

Would say that he attended all of the meetings of the board of trustees of that corporation between the middle of March and the 5th of September, 1906.

That the defendant at no time prior to September 5, 1906, ever authorized Mr. Rosene to subscribe for capital stock in the plaintiff on behalf of this defendant in any amount.

(Witness was then asked: Did the board of trustees at any time ratify any subscription made by Mr. Rosene to the capital stock of plaintiff outside of the subscription authorized at that meeting of September 5, 1906. To which plaintiff ob-

jected as incompetent and not the best evidence and calling for the conclusion of the witness;

Which objection was overruled by the court, to which ruling the plaintiff excepted and its exception was allowed; whereupon the witness answered:)

They did not.

That the first time he ever got any information from any source that Mr. Rosene had attempted to make the subscription to the capital stock of plaintiff on behalf of defendant was one morning when he was passing the Puget Sound National Bank, Mr. Furth called him in and showed him the prospectus of the plaintiff.

That was when Mr. Rosene was in New York, he had not returned for some time afterwards; that there was a meeting of the board of trustees called and held immediately after Rosene's return; it was called for the purpose of having an explanation from Mr. Rosene;

There were Mr. Treat, Mr. Thomsen, witness, Captain Jarvis and he thought Mr. A. J. Trimble, and Mr. Greenough, present at that meeting; of those trustees, Mr. Jarvis, Mr. Trimble and Mr. Greenough are dead; Mr. Hartman was present at that meeting; Hartman was attorney for the company;

That they were very much excited over the fact that Mr. Rosene had made a subscription without consulting his trustees and immediately upon his coming home the trustees were called together for the purpose of having him (Rosene) make this explanation and he explained the organization of the plaintiff, stating that it was, he thought, a good thing and good business for the defendant to be identified with; all of the trustees disagreed with him and a resolution was introduced disaffirming his action.

Witness did not know who introduced that resolution; he had forgotten but it was introduced; Mr. Rosene made the statement that if we did not want that investment that he could readily take and sell the amount that he had subscribed for their company and he asked that we make no official record of that meeting for the reason that it might handicap him when he took the matter up again with his New York associates; that is the sum and substance of that meeting;

That the resolution witness said was introduced was voted on by the board; they passed unanimously the resolution.

That the associates Rosene had referred to were associates with him in the plaintiff;

That he, Rosene, stated what his relations were with the plaintiff; that he stated he was the manager or managing director and all the time that Rosene was in Seattle during that season he assumed that position;

That witness was told that Mr. Henry C. Davis was president of the plaintiff at that time. Mr. Davis told witness that he, Davis, was associated with Houseman & Company in New York;

That Mr. Davis was out here (Seattle) after this meeting held in April, in the spring of 1906, a very sort time after that meeting.

That witness had talked with Mr. Davis at that time, met him at the entrance of the Butler Hotel;

(Whereupon the witness was asked:

"Did you notify him or had he been notified, so far as you could tell from his conversation with you of this action of the board of trustees of the defendant company." To which plaintiff objected as incompetent, which objection was overruled by the court to which ruling the plaintiff and its exception was allowed; whereupon the witness answered:)

That he met Mr. Davis at the entrance of the Butler Hotel, and they walked into the hotel and sat down there and began talking about the Development Company, and Mr. Davis asked witness about the trouble that they were making for Mr. Rosene out here, and Mr. Davis asked witness what it was all about and witness told him; witness told him of the action of their trustees with reference to Rosene's subscription, told him of their action, of the trustees, with reference to this subscription of that $250,000.

(Whereupon counsel for plaintiff stated that plaintiff's objection goes to all this for the same reason, to which the court assented.)

That Mr. Rosene went to Nome, either on the first or the second sailing of their steamer, the last of June and the first part of July.

That he did not remember exactly when it was that Rosene came back but it was in the fall, perhaps in the early fall, and another meeting of the trustees was called.

At the meeting of September 5, 1906, was the first time that the matter of this subscription came before the board after their disaffirmance in April;

That at the time of the disaffirmance in April a communication or statement was made to the board by Mr. Rosene as to payments he had made on that subscription while he was in New York, which was that he (Rosene) had paid $50,000.

(Whereupon witness was asked: "What action was taken about that $50,000; what was done about that," to which the witness answered:)

That Mr. Rosene was to sell that—he was to reimburse them (defendant) even for the $50,000—that amount was to be made good to the commercial company.

When they met in the September following it developed that other amounts had been paid—witness would refer to the books—but there was one payment of $25,000 in July—that is a transfer was made of $25,000.

That at the meeting of the board of trustees September 5, 1906, the question came up as to this subscription to the stock of plaintiff; at that time they agreed to authorize Mr. Rosene to subscribe for $125,000; at that time the plaintiff owed the $125,000, which included the $75,000 which had been paid;

That, as to what arrangement was made as to how this $125,000 which they authorized the president to subscribe, was to be paid it was already paid excepting that they, plaintiff, owed them fifty or sixty thousand dollars on the books at that time, just simply a question of giving them credit for $50,000 additional; plaintiff had already been given credit for $75,000 on this subscription—it was not on the subscription, the original seventy-five was not on the subscription—plaintiff owed that much money to defendant, up until that time they, defendant, did not regard it as a subscription at all; in addition to that plaintiff owed them some fifty odd thousand dollars.

That Mr. Perl explained the state of accounts with the board; Perl was auditor.

Witness, as secretary, had, yes and no, supervision over the bookkeeping and accounting—he had the right and authority at all times to go in and get all the data and information that he wanted from the books—he was the only officer of the company that was there all the time; of course he had supervision of the entire affairs of the company; that in a general way, he kept posted from time to time as to the state of the accounts between the company and the other parties it was doing business with; that he did not know anything about this payment of $25,000 that was said to have been made some time during that summer; that was made, he learned afterward that Mr. Rosene handed into Mr. Perl a memorandum of that kind and asked Mr. Perl to make that record; that he had seen the voucher, if it was that pencil memorandum initialed by Mr. Rosene and made by Mr. Perl; that witness had no knowledge of it at the time it was paid; might have known about it prior

to 5th of September but did not know it prior to Mr. Rosene's going to Nome.

That witness recalled the minutes where a resolution was passed by the board of trustees with reference to this matter on April 10, 1907.

(Whereupon defendant's counsel read the resolution of April 10, 1907, which had been introduced in evidence, Exhibit I, as follows:

"Resolved, that this corporation does hereby confirm its subscription to the capital stock of the Northwestern Development Company in the sum of $125,000, par value, and no more, and that the attorney of the company be and is hereby authorized and directed and required to prepare the necessary notice to be sent to the secretary of the Northwestern Development Company, notifying the said Northwestern Development Company that no subscription to the capital stock of that Company was ever authorized in any sum or sums whatsoever except the $125,000," and the witness was asked:

"Now, what was the occasion for passing that resolution, what brought it up." to which he answered:)

That as he remembered it Mr. Eccles came on the scene along about that time and he brought the matter up again. Mr. Eccles was the manager or managing director of the Guggenheim's; that resolution was passed at that meeting:

That witness would say that he gave a notice to plaintiff pursuant to that resolution; Mr. Hartman was asked to prepare a formal notice to be sent on to the office or he thought the secretary of plaintiff; that Mr. Hartman did prepare such a notice.

(Witness is shown paper marked defendant's Exhibit 3 and testified:)

That was a draft of the latter made by Mr. Hartman; that witness saw that letter when it came in the office; that he would say that the notice witness gave to plaintiff of this resolution, followed the form given by Mr. Hartman in that letter; that he was not quite sure, just when he sent that letter, but it was a matter that was very, very important to them and that notice would have been sent just as quickly as they would receive Mr. Hartman's instructions there; that according to his best recollection, that was the form of notice which he gave; that it was sent by mail, properly addressed and prepaid; Mr. Henderson was secretary of the company and that communication would go to him.

(Whereupon defendant offered in evidence paper marked defendant's Exhibit 3, to which plaintiff objected on the ground of incompetency, and the ruling of the court on the objection was reserved.)

(Whereupon the witness was asked how the financial dealings between the defendant and plaintiff was carried on here in Seattle and Alaska, and answered:)

That the defendant owned the Northwestern Steamship Company, every dollar of its stock, the same board of trustees handled the Steamship Company which handled the affairs of the defendant; that defendant acted as a clearing house for plaintiff; they disbursed all of plaintiff's funds and all of the funds that the Nome plant of plaintiff spent during the season of 1906, in building a large stretch of railroad, was handled through the defendant's accounts, that is their company's disbursements; when Nome ordered any money they drew on defendant, witness was talking about the managers of plaintiff at Nome, including Mr. Whitehead, the banker up there, he had something to do with the plaintiff; when they wanted funds they drew on the defendant here in Seattle, twenty-five or fifty thousand at a time; the defendant would in turn reimburse themselves by drawing on the New York Development Company; so all of the funds of the plaintiff both at Nome and Seattle were handled here in defendant's office; they carried all of plaintiff's freight that summer, amounting into thousands of tons, it went forward prepaid and they always handled their business on a simply cash basis; if the plaintiff didn't have funds, why they carried them until their funds in the bank were sufficient to take care of their cash account. That accounted for all this multiplicity of accounts in their balance sheet, that counsel were discussing.

(Witness was requested to look at ledger account of defendant's books against plaintiff, Exhibit K 1 and asked what amount of charges were made by the defendant against the plaintiff between April 18 and August 31, the approximate amount, and answered:)

That he would have to total that up, those ran into a big sum; would say it was at least $400,000; that balance on August 31, was $57,692.00 according to those figures.

That those charges there represent moneys the defendant had paid out for plaintiff during that period of time, or the freight owing to the steamship company, or the lighterage charges owing to the North Coast Lighterage Company or advances made at Nome on drafts drawn by Nome on them, that covers that account; as he had stated that account showed all of the money that the plain-

tiff had spent, both here in Seattle or at Nome that they knew anything about, up to and including that date.

(Paper dated July 25, 1906, shown witness, who testified:)

That was a draft drawn by Doctor Whitehead at Nome for funds that they needed at Nome; Doctor Whitehead was associated with plaintiff at Nome, they, plaintiff, were building a railroad at Nome at that time, and this was just one of the drafts made by plaintiff at Nome on them for funds to keep them in operation up there; that was paid by defendant and charged to plaintiff on the account; defendant would in turn draw on plaintiff at New York and give them credit for the amount that defendant received; that entire account was made up of transactions of that kind; he did not know whether any of the freight items were in that account or not, had not looked it over for that purpose.

(Whereupon witness was shown other vouchers then and asked to state whether those are of the same general character, and answered:)

That he would say they were all of the same order; that was in the regular form that all of these charges came down from Nome to the Seattle office.

(Witness being shown Exhibit AA, testified:)

Those are all payable to the steamship company, and they cover the cost of transportation of the plaintiff's freight from Nome to Seattle, those cover their, plaintiff's cash items for their freight, all of these.

That he would not say without checking up that account that any of those items which are covered by those checks entered into that account, Exhibit K 1, he would have to see whether they were included then but he thought they would not be; to be able to answer that, he would have to run down through these items to see whether any of these were for freight charges or not, but in the ordinary course of business, he would say they did not enter into that account at all, because the plaintiff had their own funds in here and the freight went forward prepaid and as a ship would clear, they would, from the manifest, figure out the amount of the freight earnings and give the steamship company a check for the amount; that would be the natural way of handling that business; it might be the plaintiff would not have any money on hand just at the moment to pay the freight charges, but still we would close the account by giving a check for it.

That in case of freight charges of that kind were closed by giving a check in the name of plaintiff on a bank, payable to the steamship company, he did not think it would enter into that account at all. He did not check it up to see whether any of those checks there correspond to the amount here but he took it that they did not, any of the items in those checks.

Cross examination.

That to his knowledge the directors of plaintiff never had any meetings in Seattle; that he never attended any meeting in New York of the board; never had a dollar's interest in plaintiff; never had a dollar of stock in plaintiff;

That he would say he never gave any proxy to any person for any shares of stock in his name, would not be positive as to that because Mr. Rosene told him when Rosene came back, Rosene said something about having—he referred to having part of the board out here and of course he would have to have some one to represent him here;

That he was closely identified with John Rosene at that time; he and Rosene along with two other associates organized the defendant.

That not always whatever Rosene did in witness' name to further Rosene's interest, would be satisfactory to witness.

That in a transaction such as having witness elected director in one of Rosene's independent companies, in that particular case, he thought, would not be satisfactory to witness.

That he acted as assistant secretary of the company just for the purpose of disbursing funds during Rosene's absence; some one had to do it here;

That he first heard of this organization of plaintiff from Jacob Furth; he called witness into the bank and asked him about this new company they were organizing. The prospectus would rather lead witness to believe that it was another subsidiary of the defendant—and it was soliciting the subscription to stock through the old stockholders of defendant, as he remembered it; that he did not receive a copy of that prospectus; that he received no communication from Mr. Rosene before he came back from New York, with reference to the organization of the company; the first information they had was this prospectus that Mr. Furth asked him about; would not say that he had no further communication until John Rosene came back; he would fancy that he wrote to Mr. Rosene with reference to it, because they were very much exercised over this subscription.

That he would say it was in March that Mr. Furth told him about this, could not say as to how early in March; it was a long time ago but he knew Mr. Rosene was just about ready to go to Seattle when they were first advised of it. Rosene came to Seattle, as he remembered, early in April; the April 12, 1906, meeting was called just as quickly as it could be called after his arrival here; so he only arrived within a day or two before the meeting; up to that time he had heard nothing from John Rosene with reference to the organization of this company except through Jacob Furth; this prospectus was the matter that gave them the greatest concern; would not say he wrote to Rosene about it as soon as he saw the prospectus but fancied he did; could not say positively that he got any response to his letter; his letter would surely be in the nature of a remonstrance; he presumed if he wrote they got a reply; would not say positively even that because Mr. Rosene might have been on his way home here.

(Witness shown paper marked for identification "CC" and testified:)

That he thought he had seen it before; he had forgotten this but he would say that he received it in due course by wire, about its date; that same information was practically in the prospectus of plaintiff.

(Plaintiff offered paper in evidence and it was received in evidence and marked Exhibit "CC:")

That as witness remembered it the substance of that telegram was incorporated in the prospectus of plaintiff.

That he did not have any stock in the company; he noticed by the books there was one share issued in his name; never had it in his possession.

(Witness was asked: "And you never attended a meeting of the board?" answered:)

Outside of signing his checks, outside of signing the plaintiff's checks here in Seattle, as near as he could remember, ten years back.

(Witness was shown a letter marked for identification as "DD" and asked whether he ever saw that before, and answered:)

That he would not say, he might have seen that.

(Witness was shown a letter marked for identification "EE" and asked whether that was not a copy of a letter from his office, and answered:)

That he would say so, it looked like it, and the stenographer that used to do his work.

(Witness was shown a registered mail receipt marked for identification "FF," and testified:)

That was Mr. Perl's signature on the receipt.

(Whereupon plaintiff offered in evidence Exhibits DD, EE and FF and they were received in evidence and read to the jury.)

That "H. J. S." was the stenographer.

That this meeting of the defendant in April, 1906, would be a special meeting called for that purpose.

Could not tell without reference to the by-laws how long a notice was required to give for a special meeting.

That he could not state the dates, could not say, when this meeting in April, at which subscription was repudiated, was held; those minutes were kept by him;

That this meeting of defendant's board in April, 1906, called shortly after Rosene's return to Seattle, at which this question was discussed, Rosene reported this subscription to the board; witness was the secretary of the company at that time; it was his duty to keep the minutes;

That in this instance he did not keep the minutes; that as before stated they did not take any minutes of that meeting for the reason that they did not want to embarrass Mr. Rosene any more than was necessary, in order to help him to get out from under this difficulty; that he could have had a memorandum of the transaction without inserting it in the record, and could have preserved that but he did not do that;

Did not remember of requesting Mr. Hartman to make a memorandum of the minutes; Mr. Hartman was there and witness talked the matter over with Mr. Treat before he, Treat, invited Mr. Hartman down there; they wanted to do whatever was necessary to preserve their legal rights in the matter; that was why Mr. Hartman was there; he usually did not meet with them in their trustees' meetings;

That he had heard only a part of Mr. Hartman's testimony yesterday;

Didn't think he was here (in court) at the time Hartman made the statement that he, Hartman, made a memorandum of the minutes in order to be able to draught the proper resolution;

That he could not say who, at that time offered the resolution repudiating the subscription; Mr. Treat and Mr. Thomsen were the ones that were more active in the discussion of this entire matter; Mr. Rosene was in the chair; would say that Mr. Rosene put the motion; he always did, he always was in the chair when he was present and he was there at that time; and this motion was put by him;

Would not say that the secretary read it before it was put, would say that the motion was made—didn't know whether it was in writing or whether it was just simply a verbal motion; could not say as to that postively; it was a very important matter; it would impress itself on his mind at that time so much so that he would have some memory of the method in which he disposed of this $125,000 transaction, or this $250,000 transaction; he was just as positive as anything in the world that that motion was put and they repudiated that subscription and it was so understood by every single trustee present; it may have been put both orally and read from a paper, it may have been handled both ways—it is ten years ago.

If read from a paper, he could not tell what became of it; any formal resolution reduced to writing might have been in the secretary's hand; that might have been the natural thing, as they were all sitting around the table, and if there was no record to be made or kept of that meeting, there would be no occasion for keeping that particular resolution; witness would not keep it anyway because the only minutes that he kept of any of these trustees' meetings were right there in that book.

That he would not keep a separate memorandum in writing showing what the transaction of that board of trustees was after it was determined by the board not to put it in the official minutes, because it was unanimous that the matter was repudiated;

That he said this matter next came before the board in September after Mr. Rosene came down from Nome;

Returning to the April meeting, Mr. Rosene was to dispose of the stock of this subscription and get us back even the $50,000 that he had paid, they were to be reimbursed for that amount;

That he learned later in the year before the September meeting, that there had been an item of $25,000 credited on the open account for plaintiff on their books; not on this subscription; all that he learned about it was just as you see on that memorandum; he noted where Mr. Rosene had given Mr. Perl instructions—if witness could refresh his memory, where Mr. Rosene had given Mr. Perl instructions to make that entry on his books;

That this memorandum read that it was on the subscription; it looked that the whole item as shown by the voucher was a credit

on the subscription; it read that way; that was the memorandum which he saw prior to September, that is when he discovered that an additional amount had been paid or given credit on their book. Witness had access to the books;

That Mr. Perl, the auditor, would have taken instructions from witness, also from Mr. Rosene.

Witness did not instruct Mr. Perl to charge back this item of July 15, of $25,000, as shown by that voucher;

That was an item similar to the $50,000 already gone into the same channels as that $25,000 that was not anything they could do until Mr. Rosene returned to Seattle.

(Witness was shown Exhibit K 1 and asked to show how much his Company owed the plaintiff on July 15, 1906, and answered:)

They didn't seem to be balanced on that date.

Would not say the Commercial Company (defendant) was indebtedness to Development Company (Plaintiff) in the sum of $75,000 on that date; would say only fifty; they are credited on June 25 with $25,000; on July 7th with fifty and then on July 9th they are charged with $25,000 and then on the 26th they are charged.

On the 15th they are credited with $25,000; that would leave $75,000 to their credit up to the 15th—yes.

That it would have been feasible to have charged this item of $25,000 that is in the voucher of July 15th back on that account —there were funds there on the plaintiff; but counsel seemed to overlook the fact that this defendant was provided at all times with funds to disburse the plaintiff's expenditures.

They started in from the inception of the plaintiff to do it and they were—they did not want to do anything to harass the plaintiff, but they wanted to keep plaintiff's fund on hand at all times because they did not know what steamer might come down with a draft on them and they wanted funds on hand at all times to take care of their affairs, their indebtedness.

That they drew on New York to reimburse themselves for any payments they made for plaintiff; they were simply a clearing house.

(Witness was then asked: "Now on the 15th of July you find your company owed the Development Company $75,000—now why didn't you charge back this item, if that had been wrongfully credited to them," and answered:)

Why charge it back, that he would not have charged it back until Mr. Rosene came back.

That on September 5th he might have gone in there and looked over the accounts, and he often did;

That on September 5th, this plaintiff company owed them $57,692, which added to the $75,000 which had been charged against their company and credited plaintiff, would make a little over $125,000.

(Witness was then asked: "And it was for the reason that these accounts about balanced in that way, that you said, 'well, we will take $125,000 of this stock and call it square,' " and answered:)

That might have entered into it, but they decided to take the $125,000 of that subscription; that was what they decided to do; their books showed that they had already been paid a certain amount on the subscription so that they decided, after discussing it very, very thoroughly, that they would take $125,000, because they took it up and discussed it and decided to make it; this controversy was hanging all summer.

(Witness was then asked: "What controversy was there if you had repudiated this subscription," and answered:)

That they were doing business for the plaintiff and Mr. Rosene always contended that they should make a subscription to plaintiff's stock, so that after Rosene came down in the fall, they decided to subscribe for $125,000.

The plaintiff had $75,000 of their money already and perhaps $100,000; plaintiff owed them $57,000 more on open account; decided to dispose of it one way or the other, whether they were going to subscribe or not—they decided to subscribe and authorized him to subscribe.

(Witness was then asked: "And it was not because they were indebted to you and you could not collect the money, as Mr. Hartman suggested yesterday—that was not the reason, was it," and answered:)

That he did not think that plaintiff ever let a draft go to protest at this time; that there had been no repudiation of plaintiff paper;

That he didn't know whether plaintiff was financially responsible or not—would not even say that one of the drafts did not go to protest; would have to look it up and find out.

He would like to look up the account and see—if the books

say they paid plaintiff $32,000 in October to balance that account, he would say they did.

That Mr. Rosene did not finally persuade the board that the investment was a good investment because if counsel would refer to the minutes he would find that it authorized him to turn right around and sell down to $50,000 if he remembered right.

(Witness was then asked: "Now, why, having only $75,000 invested in this subscription, why raise it $50,000 more and then on the same day authorize a disposal down to fifty," and answered:)

Why do it. It was their way of doing business, and then they wanted to sell down to $50,000.

(Witness was then asked: "Why not sell down from 75 to 50 and not put in 50 more," and answered:)

Plaintiff owed defendant fifty and they (defendant) wanted to close that account.

(Witness was then asked: "Was that the only reason," and answered:)

Well, yes and no. They wanted to close it up and make—if they were going to do anything they wanted to make a subscription for the $125,000; they decided on that, and they decided to close their account on that basis, and they immediately authorized Mr. Rosene—he was going to New York, as witness remembered, very shortly to sell them out to $50,000 and witness was not sure but what plaintiff was getting very low in funds about that time; he would have to look it up;

That they still had to provide for the drafts coming down from Nome to cover the season's work.

That they might have been advised as to the funds available down at New York to cover those drafts; New York was being advised at all times to the amount of expenditure up there at Nome;

Witness didn't know, when they decided to just take $125,000 stock on which $75,000 had already been paid, that they (or whether they) credited them, plaintiff, the other $50,000 in lump on September 5, 1906; he could not tell from those books.

(Whereupon the witness was asked questions and answered the same as follows:)

Q. Look at the record—is there any item of $50,000 cred-

ited to the Development Company on September 5, 1906, or September 6, 1906, the following day?

A. This here looks like a pencil memorandum.

Q. I do not want any pencil memorandum—is there any permanent record in ink?

A. Is this in ink?

Q. You can tell whether it is.

A. Is that a pencil memorandum?

Q. Yes, sir, that is a pencil memorandum—here are the items, is there any item of $50,000 audited to the Development Company?

A. Not against that $57,000, no, sir.

Q. If you decided to take the $125,000 in stock, that is to put in $50,000, why not give them credit for it on September 5th?

A. They seemed to have entered it up here after this $25,000 item.

Q. Those are Mr. Ford's memoranda, he said they were an investment, and he put them there?

A. If the first one of September 6th is on account of that subscription and the other on the 25th—that is just simply a matter of detail as to when these instructions went to the auditor's office.

(Witness continued:)

That after the board determined to take $125,000 and to credit the balance, which would be $50,000—to credit plaintiff with that balance—they made two credits of it, instead of one; probably that was just bookkeeping that was all; there must have been a reason for it at that time, but he could not tell why.

(Witness being referred to vouchers that counsel for defendant exhibited to him asked: "These do not show a draft drawn on the Commercial Company, do they?" and answered.) That they handled them just the same.

That he would have to look at the draft to answer that question; that those vouchers showed drafts were drawn on defendant; if they were not the defendant took care of them; that he was going to say still they were drawn on defendant.

That record, witness had in his hand, showed that they were drawn on John Rosene, chairman of board of directors of plaintiff company;

This account for $51,703 did not make any memorandum of that at all, and there was another numbered 5554, made no reference to that at all; it does not say on whom they were drawn; but all these drafts at Nome came through exactly the same channels and they were treated exactly the same one with the other.

The defendant was the clearing house, taking care of the drafts and drawing on New York to cover itself; it would not have made any difference how those drafts came down, they were all treated exactly the same.

(Witness shown Exhibit K-1.)

That the balance of September 5, 1906, against the plaintiff was $57,600 as he had theretofore testified;

That he found an item of $40,000 there to the credit of the plaintiff on September 5th, that was not included in the $57,000; that was where they made another draft on New York for $40,000, at that time;

That defendant gave plaintiff credit there for $40,000, and defendant would not get that money until that draft was paid;

From defendant's books, assuming the draft was paid, it would show that that additional amount was to plaintiff's credit; that the draft went though the bank and defendant took credit at the bank for it and defendant credited the company for it;

That it was not an error when witness testified on direct examination that that particular piece of paper (Exhibit K 1) showed, by the entries on that paper, that plaintiff was indebted to witness' company for $57,000, because this balance—at that time this balance shows it was $57,693.

That the balance was struck August 31; and on the 5th of September there was a $40,000 credit.

(Witness was then asked: "And that would leave $17,000," and answered:)

That counsel seemed to overlook that fact that Nome was wiring, at all times, that they were drawing on Seattle to cover expenditures there. Defendant, in turn were taking care of the finances at this end and would make drafts on New York to keep their account good here—at all times defendant did that, right from the inception.

That the balance on August 31, was $57,600; that on Septem-

ber 5, then they had a credit for $40,000, that reduced the balance to the difference between the one item and the other, which would be $17,692 on the 5th day of Sptember, 1906.

Redirect examination.

That was the first time witness ever received or saw any certificate of stock in plaintiff company in his name, in letter from Mr. Rosene written witness from New York October, 1906 (letter which had been shown witness.)

That he followed Mr. Rosene's instructions and sent it (one share of stock in witness' name) back.

It was never in witness' possession at any time after he received it by mail and sent it immediately back.

(Witness' attention being called to minutes of meeting of plaintiff's stockholders, on March 29, 1906, which recited there were present by proxy stockholders, among others, witness. "J. D. Trenholme, by Millet W. Baldwin, proxy one share," and was asked: "Did you give Mr. Baldwin any proxy to represent you at the stockholders' meeting on the 29th day of March, 1906?" and answered:)

That he didn't think he had ever heard of Mr. Baldwin before.

That he might have on 29th March, 1906, heard of plaintiff because that would be just about the time that Mr. Furth would have called his notice—would have called him into his bank and advised or shown him this prospectus.

That was before Mr. Rosene's return to Seattle.

That he had never heard that he had been named or that any stock had been issued in his name, at that time; that he would say he had never authorized any representation at that meeting, no; that he did not think that he ever authorized any one to represent him at any stockholders' meeting.

That why his company agreed in September meeting of 1906 to authorize the President to make a subscription for $125,000 and immediately at the same meeting passed a resolution instructing the president that out of that $125,000 to sell that stock down to fifty, was because of the indebtedness of plaintiffs to defendant at that time; and it was also on account of the company wanting to make their subscription whatever they were going to make, and it was for the further reason of helping out the plaintiff in the finances elsewhere;

Plaintiff was getting at that time very short of funds, and the

drafts were coming down very fast from Nome, and defendant was advised of their requirements up there, and defendant was providing for funds to take care of those drafts.

That witness was not a real good bookkeeper but he could understand books.

(Witness shown Exhibit K 1 and asked to state at what time the account of plaintiff with defendant had been balanced last before their September 5th meeting, and answered:)

That it was a running account all summer as he remembered it; it was balanced from time to time; July 27, it shows a balance here—no—it was balanced then but they had a credit of $85,000.

August 31 was the last balance that showed at that time that plaintiff owed defendant $57,000.

That was the way the books stood balanced up to the 5th of September, the day after their meeting.

That any statement which had been made by the accountant or auditor as to how the balance stood of this account on that date would not have shown that $40,000 at all.

That the $40,000 would not be under discussion at all at the time they were discussing that balance of $57,000;

That $40,000 would represent a draft which would be drawn by the defendant and go through New York for collection; and if it was paid defendant would get credit for it; and if it was not paid it would be charged to defendant here; that it would take about ten days to actually get the funds in the ordinary course of business; so that the account stood at that time that the $57,000 already credited on this account of the plaintiff and the plaintiff still owed them $57,000; and defendant agreed to take $125,000 in stock; Mr. Rosene at that time was still chairman or managing director of plaintiff; didn't know whether Rosene was satisfied with that adjustment of this controversy at that time or not; he, Rosene, had to be satisfied; it was the action of the trustees at that time.

(Witness was shown a voucher Northwestern Development Incorporated, to Northwestern Commercial Company dated October 29, 1906, August 10th draft issued at Nome by Caleb Whitehead, Assistant Treasurer of Northwestern Development Company, on John Rosene, Chairman of the board $20,000; draft to Northwestern Development Company, charge Northwestern Development Company, accompanying which was this voucher on the bank, "Northwestern Commercial

Company to Northwestern Steamship Company, entered August 20, 1906, credit N. C. L. Co,'' and asked what does that mean, and answered:)

North Coast Lighterage Company; that was owned by the defendant; that $20,000 was a credit to the Lighterage Company account; that meant that the plaintiff at Nome owed the Lighterage Company for lightering goods and here was where they had drawn on them to cover this account, $20,000, to the Lighterage Company; he supposed on August 20th John Rosene would be either at Nome or en route to Seattle, about August 20th or he might have just arrived here;

When that draft came in here defendant would pay that draft just the same as they would pay any of the other drafts, and charge up that amount and issue a check for it on plaintiff's fund and pay the draft; that is dated August 20th—the charge is made August 10th, it is dated August 20th.

(Witness was asked to state whether he found the plaintiff charged with that $20,000 on Exhibit K 1, account of plaintiff with defendant, and answered:)

There was a charge on August 20th of this same amount and he presumed it was the same identical charge; Exhibit K 1 refers to ''V 5673'' and it carried with it the same voucher number; that voucher number there V 5673, that was entered there; so that in that way the debt of the plaintiff to North Coast Lighterage Company which was owned by the defendant was satisfied, and the plaintiff charged with the same amount to the defendant; the entire transactions of the entire year were carried on in exactly the same way;

(Witness was shown item which appeared to be voucher of the Northwestern Commercial Company account—Northwestern Development Company, credit North Coast Lighterage Co.—draft issued at Nome on John Rosene, chairman of board N. W. Development Co. $30,000; on which voucher it said ''Northwestern Commercial Company to Northwestern Steamship Company, August 9, draft issued at Nome by Caleb Whitehead, assistant treasurer of Northwestern Development Company, on John Rosene, chairman of the board, $30,000, draft to N. W. Development Co., charge Northwestern Development Company No. 5511'' and asked was that the charge there and answered:)

Yes, that represented an indebtedness of the plaintiff to the Steamship Company which was paid to the Steamship Company by this draft on their chairman, which defendant took up and

charged to plaintiff; this was Lighterage Company business; this was the cost of lightering the goods from ship to shore; this $30,000 charge;

That a similar item under date of July 26 is a voucher, No. 2428 for $25,000, which was a similar transaction that seemed to be the Steamship Company; it was credit to Steamship Company, that was for freight charges, $25,000; the "OK Perl" was Mr. Perl's handwriting, who was auditor of the Steamship Company; and of the defendant and of the plaintiff too, he thought.

(Witness shown debit notes, voucher 5498)

Voucher No. 5498 he would have to get Mr. Ford to run that down; it says "A. B. & S. D. Co." that was Alaska Bank & Safe Deposit Company, Mr. Whitehead's at Nome; that was $25,000 and there was another $50,000 to Nome; that is a debit note of defendant;

(Witness shown Voucher 5554 one item $25,000 debit note, home office, draft on John Rosene, chairman of the board, and another deposit on the National Bank of Commerce, aggregating $3000.)

That was where they got credit for it, wasn't it, well, that might be charging the Commercial Company and crediting the Development Company; that Mr. Ford could tell about that, witness couldn't.

(Vouchers offered in evidence by defendant and received in evidence and marked Exhibit No. 4;)

Recross Examination.

(Witness asked if he would look up the by-laws of the Company and advise the jury what notice was required to the trustees for a special meeting; minute book of defendant company shown witness; witness reading from minutes:)

"Regular monthly meetings of the board of trustees to be held on the first Monday of each month, and the majority of the board of trustees shall constitute a quorum for the transaction of business."

(Witness continued reading from minutes, by-laws respecting notice required to trustees of special meeting of board of defendant:)

(Witness asked to name members of defendant's board in April, 1906, and testified:)

That he would have to refer to the books to tell; he thought the annual meeting was along about in August; perhaps in April;

(Witness requested to ascertain from minute book who were the trustees.)

There was Rosene and Williams and himself and Jarvis and Mr. Moritz Thomsen, April 18, 1906.

March 30, 1906, there was Mauritz Thomsen, Trimble, Treat, Williams, Trenholme, Jarvis and he knew Mr. Greenough, who resided at Missoula, Montana. Mr. Trimble was living here at that time; Mr. Greenough was over here a great deal of the time at that time; he was here at that meeting on April 12, 1906; didn't know whether it said so.

At the April 12 meeting there was Mr. Rosene, Trimble, Jarvis, Trenholme and Williams;

Witness did not say that was the meeting when, he testified, that the subscription was repudiated;

That meeting was shortly after Mr. Rosene returned from San Francisco en route from New York; that was not on April 12th; it was the early part of April, just after Mr. Rosene returned, would not attempt to say it was before April 12th; could not say whether it was before or after, it was in the early part of April; if there was no record in the book of any meeting prior to April 12th there was no meeting; there was a special meeting, besides the April 12 meeting, on April 18th, that was a stockholders' meeting;

There was none other excepting the meeting that witness and counsel had been discussing here, the trustees' meeting April 18th, Mr. Greenough was present at that meeting, no other meeting in April;

That counsel could not pin witness as to the time of that meeting; witness would say it was immediately after the return of Mr. Rosene from San Francisco;

That Mr. Rosene came along very shortly after the date of the telegram read in evidence, April 3, could not say as to within a week; it was in the early part of April; thought Mr. Rosene arrived before the annual election; thought possibly Rosene was here; Rosene had a lot of proxies here on April 18th and so witness would say he was here prior to that time; would say that the meeting at which the subscription was repudiated was prior to annual election; because it would be one of the first things—it was the first thing taken up and discussed after his arrival.

Would say that due notice was given to all the trustees of that special meeting in April;

That he would say that the meeting of trustees at which this subscription was repudiated was held prior to the annual election;

Would say that that notice was given of that meeting; Mr. Greenough was present at that meeting, was not talking about April 12th now.

Question: "You notice by the minutes of April 12th he was not present—he could not have been present:

Answer: There may have been a similar error in regard to that as in regard to the other."

Question: "Now, what notice was given?"

Question: "For the meeting of April 12th?"

Answer: "It says 'waiver of notice of said meeting having first been signed.'"

(Witness, continuing, testified:)

Answer: "For what meeting?"

That he could not tell who signed that waiver; that he had not seen it; it was a special meeting called according to the record; could not tell whether Mr. Greenough signed that notice without seeing the waiver; there were no minutes kept of the trustees' meeting, at which this subscription was repudiated; there were no other transactions taken up; and no minutes of anything not even of those present; there was no record kept of it whatever;

That counsel had been told a dozen times that that record there of April 12th is not the record of the meeting at which the subscription was repudiated; Mr. Grenough was here at the meeting at which the subscription was repudiated.

Witness excused.

Whereupon, with the consent of counsel for defendant and of the court, plaintiff was permitted to withdraw the tender it had made previously of the 25,000 shares of common stock and 25,000 of preferred stock and immediately retendered it, under the terms as before, together with the war revenue stamp attached, so that plaintiff's tender now was with the stamps upon them.

Whereupon the court overruled the defendant's motion for non-suit, such ruling going to that reserved ruling on the admission of the evidence of the minutes of the meeting of plaintiff's board in Seattle and the court overruled the defendant's objection thereto and permitted it to go in; and therefore documents were received in evidence on behalf of plaintiff and marked Exhibits "D 16 and T 5."

WILLIAM J. FORD, recalled as a witness on behalf of defendant, testified:

(Witness' attention being called to Exhibit K 1 and defendant's Exhibit 5, he was asked whether the items thereon, Exhibit No. 5, marked "debit note number 9 and debit note number 3" were charged against the plaintiff on the account shown on Exhibit K 1 and he answered:)

They were.

That those debit notes represent a charge from the Nome store to the home office in Seattle for two drafts, one for $25,000 and the other for $50,000, drawn on John Rosene, chairman of the board of directors of plaintiff; that voucher, in connection with those debit notes, would indicate that the Nome store had received these two drafts either in exchange for money or supplies, and being drawn on the Seattle office they were charged to this office for clearance and were charged direct to the Development Company account here in Seattle. If that transaction took place in that way that was a correct entry, a correct charge.

(Defendant offered paper in evidence.)

(The witness:)

One of those is $25,000 and the other $50,000, there are other items on that debit note which have no bearing on this case.

That debit note meant a debit memorandum, not a promissory note; it did not show upon whom the $50,000 draft was drawn but did the twenty-five;

Did not know who was the manager of the Alaska Bank & Safe Deposit Company; those drafts, according to this record were sent by Caleb Whitehead, assistant treasurer. Did not mean the draft for $50,000; meant that the one draft of twenty-five was sent by him.

(Counsel for defendant thereupon read debit notes, as items of $25,000 and $50,000 charged on Exhibit K 1 to the defendant by plaintiff.)

(Witness shown paper marked for identification defendant's Exhibit 6 and asked what it was, and answered:)

That it was a journal entry similar to the one counsel had here, including the two debit notes, one of them number 11 for $25,000 covered draft drawn on the home office against John Rosene, chairman of the board, and charged to plaintiff, from that

journal entry; that was only the one item of $25,000, and that was one of the items which was charged on that account.

(Paper marked Exhibit 6 offered by defendant and received in evidence.)

(Witness continued:)

That he had been and was the auditor of the defendant, and had charge of its books and was familiar with those books; that there had never been any item credited on those books of the indebtedness of the defendant to the plaintiff on that unpaid stock subscription which was being sued for him; that it had never appeared on the books of defendant at any time as a liability of that defendant.

Witness excused.

JOHN ROSENE, recalled as a witness for defendant, testified:

That he had been sworn; that he had resided in Seattle seventeen or eighteen years; was acquainted with the plaintiff in this case; was one of the promoters or organizers of plaintiff;

That he went to New York in December, 1905, Mr. Williams, who was then vice president of the defendant, came to him and said that Mr. French, commonly known as Major French, was anxious to have witness become a director for the Kugarok Corporation in connection with which they (we) were doing they (we) were building a railroad and doing some development work in the Kougarok district; the railroad being on the Seward Peninsula; and witness declined to do this at first but after Mr. Williams came the second time witness agreed to look into the matter. After witness had looked into it he declined but he came again; eventually during the winter, the position arrived in February, 1906, when witness thought the ownership of the then Arctic Railway or the Nome Arctic Railway, now the Seward Peninsula Railway—would be a good business for defendant. So witness made up a little synopsis of such an idea and one morning in the restaurant of the Waldorf-Astoria, he handed the slip of paper to Mr. Arthur Housman of the banking branch house of A. A. Housman & Company, and said "Arthur, please—"

Mr. A. A. Housman was a member of the New York stock exchange, a stock exchange broker and banker in that class of banking; handed the paper to Mr. A. A. Housman—witness made it up himself; so witness asked him to take it down to his office and late in the evening or the next day, give witness his view of that as a railway to work in the north, that could only work a few months in the year.

That evening witness saw Mr. Housman and he hunted for witness in the Waldorf about seven o'clock and surprised witness by showing witness he had taken that piece of paper that witness had given him, word for word, without any knowledge or consent on witness' part and cabled it to a man named Fisher at Dundee, Scotland, urging Mr. Fisher to go to London and start a man by the name of Myers to come over and do this business and at the same time as he had this—this had taken place about practically twelve or fourteen hours since witness gave him the paper—he also had a cablegram from Mr. Fisher and son from London saying 'Leaving for London immediately''. It so happened that that did not please witness because he was committed to Haldron & Company, another banking house, for this particular business and he was unwilling to do it, but the next morning Mr. Housman had a telegram—two of them—one from Fisher at London and the other from Mr. Myers at London, that Myers would leave on the following Saturday steamer for the purpose of doing this business. And with that Mr. Housman figured, or felt that he had witness committed stronger to him than to Haldron & Company, and that Mr. Myers would get it. Myers came in due course. The first time witness saw him he had been pretty seasick and he had laid up in the St. Regis Hotel a few days after he got ashore, trying to get over it and he said to witness, he said "Mr. Rosene, I am glad to meet you, but I am very sorry to have come on a mistaken errand. I find that this railway is one which can only run for four or five or six months in the year. We have no clients for that kind of securities and I cannot do that business."

Witness said promptly: "Mr. Myers, I am very glad of it—I can go home tonight." But there was some things about it and secondly Mr. Myers and Mr. Housman and Mr. Farquhar, whom witness had never known that time until he came to the Waldorf-Astoria that evening to look for witness, and Mr. Myers' statement was, in effect, that while he could not handle the bonds of a railway that only operated a part of the year, he could finance the transaction if it had other business, like mining properties, and that he had been told through Mr. Housman that there was some possibility of obtaining mining properties in connection with the enterprise, and they wanted to know what witness had to say about that. Witness told them of this plan of Major French, of him having the mining properties and Major French was communicated with that evening on the telephone at New Rochelle—witness was not quite sure about it but any way the next morning—and it developed then that, while French had the right to sell these mines, he did not have the title—that the title stood in the name of a man named McConnell, and he was in Seattle and had to be sent for; witness had no interest in those mines; had never heard of them ever; so, while McConnell was coming on the way, there was plans made and

Mr. Myers and Mr. Farquhar or both, sent to Boston for an attorney whose name witness didn't for the moment recall, one of the names in the firm was Storey, or something like that—they were attorneys of record for this plaintiff, so it should be easy to find. And the plan for the organization of a company on those things—Judge Dubois who was there—he had the deed for the mining property but he did not have the right to transfer or make any deeds, but he had them and he had made an examination of those titles; he had made an examination of those titles during the previous summer for the purpose of facilitating the sale of those mines or whatever his plan was.

Judge Dubois was a lawyer in Nome, then in New York. In New York witness rather thought Dubois represented himself and any client that came up; but he was representative of French and McConnell in this transaction as attorney and he became representative of the plaintiff a little later, so far as passing on titles. So, after these attorneys came from Boston it was decided to have a company that should own these mining claims as soon as the man should come that could sell them; and own a railway to connect those mining claims to tide water at Nome.

French's plan had always been to connect those claims with tidewater at Port Clarence Bay, or as we call it, Teller—which witness opposed; and after that had been agreed on the price was agreed on as $245,000.

That was agreed with Major French, because McConnell was not there yet, but they had telegraphed backward and forward and they had it all arranged among themselves.

This $245,000 was the price of the mining claims.

After that had been agreed to and the corporation outlined in conversation and perhaps in document, witness gave but little thought to the matter—it was suggested by Mr. Myers and agreed upon by Housman and Farquhar, agreed not to witness—that they would make a different corporation—a thing witness had never anything to do with before—with common stock.

They explained the reason for making the common stock so as to use it as a bonus in connection with floating the preferred stock and as a bonus and profit to the promoters and insiders, if you like to call them that. That witness did not like very much but they explained to him that in England—Mr. Myers in particular—that was a very desirable feature of it, and so, where everybody else was unanimous that the thing was right, there was no use in witness saying it was wrong. It did not make any material difference to witness one way or the other, so that it was

agreed to. And, then as soon as Mr. McConnell came, or within a day or two afterwards, the question came up, they did not want this transferred—this arrangement made with McConnell because they didn't know him—he was a stranger. Witness meant Housman and Farquhar and Myers and those gentlemen didn't—they had some idea about Major French that witness didn't know exactly, but any way they thought that witness was the man to take the responsibility for this stock so that it would go the way they wanted it; two and a half million of it into the treasury, or to the treasurer, and a million and a quarter to the promoters, and witness asked those attorneys if there was any objection—if he was taking any chance or liability in doing this and they said no, and so he agreed to it and in due course Mr. McConnell signed a deed that this gentleman had prepared from him to witness and at the same time witness signed a deed from himself to the company.

That was the deed from Mr. McConnell to witness conveying those Alaska mining claims;

And witness immediately passed it on to the company by another deed.

The title was in witness probably five minutes and probably not more than one minute.

Witness believed that that price, $245,000, was all agreed on as between McConnell and French prior to that by telegraphic correspondence—if there was any real discussion, except that he agreed to accept that, that is the only thing that witness knew of—if there was any other discussion witness didn't know it.

Well, then, after they had agreed to the plan for this common stock in this fashion, they (we) struck another snag in the fact that Mr. McConnell did not want to take anything but $245,000 cash. The company was not yet organized and had no funds and it would have been some days before it could be done, and somebody—Mr. Myers was there, he was anxious to agree to get an option—he was willing to pay $25,000 flat for an option on half the capital stock; that is one-half of the two million and a half, that is one million and a quarter, and he did pay $25,000 for it and he said the only reason he would not take it over was he had a partner by the name of Manter in London and he was not in a position to make such a transaction except justified by his partner. Mr. Housman said he would take whatever Mr. Myers would not take—that is the firm of Myers & Manter. Mr. Farquhar said he would take $250,000, witness said "Then I will take $250,000 for the Commercial Company" and Housman said: "I will take $50,000 for myself" and witness said "Then I will take $250,000 for the Commercial Company." They (we) agreed then and there that business was done.

It was the common consent among us that the business was done then and there when Mr. Myers was willing to take half a million dollars provided his partner agreed and he was sure he would agree, and Mr. Housman was willing to take half the stock and anything more that the other fellows would not take; Farquhar wanted $250,000 and witness wanted $250,000 for the Commercial Company, and then $50,000 for each of ourselves. So, in other words, it looked then and there that that business was overdone so far as over-subscribed, as soon as it could be put in formal state.

Furthermore, witness insisted that Housman could not take any subscriptions until the stockholders of the Northwestern Commercial Company had been given an opportunity to take anything they wanted of it. So that there was a demand from all sides.

(Witness' attention was directed to his statement that Mr. McConnell raised some objection to parting with this title to the mining property until he could see the money, or a reasonable creditor for it, and was asked what was done about that, and answered:)

Mr. Housman and Mr. Myers and witness, by the use of $50,000 from Mr. Housman and $25,000 from Myers and he believed $50,000 or thereabouts from himself, made up a pool, that made, if he remembered correctly—that was a detail he was not quite sure of —and he loaned to the plaintiff his checks and notes several years ago and they never returned them and he was not in a position to refresh his memory—but anyway he believed that he paid Mr. McConnell $125,000 in cash and gave him, witness' own personal note for $100,000.

That was at the time he passed title to witness and witness passed it to the Company.

(Witness' attention was directed to his statement that under the plan, the common stock, was all to be used as a bonus, two and a half million of it to be turned back to the treasurer to be a bonus on the preferred stock and one and a quarter million of the common stock to be turned over to the promoters and was asked—who were the promoters, who were to share in that million and a quarter of bonus common stock; and answered:)

Well, as far as it ever went on record, it would be himself, Mr. Housman and French.

That million and a quarter of common stock was to be divided between (us) three gentlemen, then the promoters of the company.

The plaintiff never received any payment of any kind for that million and a quarter of common stock that was issued to those promoters; it never received anything whatever either in money or property for the two and a quarter million of common stock that was turned over to the treasury, that was to be used as a bonus on the preferred stock.

Witness went up to Boston to get a lawyer to organize the company, and he organized it. He didn't believe that those things were completed when he left New York because he had been delayed there so much that they were still working at that, but he was the only attorney that witness saw in connection with the matter and witness believed he did it all.

Didn't believe that he saw the articles of incorporation drawn up by him for plaintiff;

Witness was too busy, he had too many other things to do and he would go into Housman's office about ten or fifteen times a day when they would ring for him—and he would come out and he did not read any of those papers; he just signed such as they told him was proper to sign.

He saw the by-laws adopted by plaintiff, some months later he believed; if it required his signature or any part of it he would be sure to see the resolutions that were passed by the board of directors of plaintiff authorizing payment to him of $245,000 cash and $3,750,000 in common stock, as a consideration for the conveyance of this mining property—he never read them.

He understood at the time that there would be resolutions or that the matter would be put through the minutes of that company so as to show that the consideration for the mining property was $245,000 in cash and $3,750,000 in common stock instead of merely $245,000 cash; that was the arrangement he objected to strenuously, because he thought it was useless, nonsensical and useless.

The grounds of his objections were because any value—he was interested in the matter more largely from the railway point of view so as to connect with the steamers—any value that was in the claims over the $245,000 that they actually paid for them, could go just as well to the preferred stock as to this bundle of common stock, and there was not any sense in that arrangement that he could see.

The explanation given to him for insisting upon putting it through in that form was that they could handle it better and make more money out of it, particularly on the London market.

(Witness was asked: "Was the question discussed with this Boston attorney during that time as to whether there was any way they could get this bonus stock in such a manner that there could not be a legal liability against all of them for it" and answered:)

As he had said before he was in there so few minutes off and on—any discussion—he remembered it was assured around that it was all right and legal and it was all right, financially it was a good thing to do and legally and anything like that—he didn't know anything about it, and for one he didn't think so; and he didn't today either.

He had heard the names of the incorporators and of the men whose names were inserted in the articles of incorporation the other day, he thought that was the first knowledge he had of it—he didn't remember those names; he didn't know who those gentlemen were; they were not parties to the transaction, they were not at the New York conference.

So far as he knew they had no interest in the company. This gentleman from Boston selected the men whose names would be used in the articles of incorporation in going through the forms of incorporation, and witness was inclined to think he (the man from Boston) made a run either to Boston or Portland, Maine in connection with that—witness remembered he was absent—witness was sure he went as far as Boston one day—but he was the one that made them.

He did not know Clarence E. Eaton holding three shares, James J. Hernan holding two shares, George C. Ricker holding two shares, W. F. Crummett holding two shares, J. L. Brophy holding two shares, the original incorporators.

He knew Arthur A. Housman, Henry C. Davis, L. H. French, George Henderson, Edward A. Pierce, directors at the time of the passage of the resolutions for the purchase of this mining property.

Mr. Arthur Housman was the same Housman he spoke of as the man who was to get his share of this million and a quarter bonus stock.

Henry C. Davis was a partner of A. A. Housman in the firm of A. A. Housman & Company.

Edward A. Pierce was one of their chief clerks and probably manager under Clarence Housman, or something like that—he had a responsible position in Housman's office; was an employee of A. A. Housman & Company.

Leigh H. French was the gentleman he mentioned that Mr. Williams wanted witness to become a director of his company, early in December, and that led up to this whole business.

That was the same French as he said was one of the men who was to share in the million and a quarter bonus stock.

Mr. Henderson used to be one of the managers for R. G. Dun & Co. in Texas, in fact was manager for R. G. Dun & Co. for years and then he went into New York and went into the finance business in connection with B. F. Yoakum; and Henderson and witness became very good friends, and when this business came up witness asked him whether he would be secretary of the plaintiff and look after the details, that much, and he agreed to it.

He was the only one witness had anything to do with, in the selection of the board.

And the other four persons were Housman and Davis, his partner, Pierce their employee, and French, the joint promoter.

Mr. Henderson had never seen the mining property, did not know anything about it. He had never been to Alaska; he was acting merely at witness' request.

He had no financial interest in the company.

Pierce had never been to Alaska. He had never seen this mining property.

Housman had never been to Alaska. Davis had never been to Alaska.

Out of the five trustees the only one in the lot that had ever been to Alaska was French.

And the only one that knew anything about this property was French, and he claimed to know a great deal more than he did. He was one of the promoters that was sharing in this bonus deal.

(Witness was asked: "It has been stated here Mr. Rosene that that million and a quarter of common stock which you spoke of as the bonus going to the promoters, was issued, so far as appears on the books—to you—do you know anything about that." and he answered:)

"No sir."

That he never received it, never saw it. Did not know where the certificates were. That if counsel wanted his opinion as of where those certificates are, that is where they are, turned over to A. A. Housman & Co. but he didn't know. He had never had them in his possession;

(Witness was asked: "Was the question discussed with this Boston attorney during that time as to whether there was any way they could get this bonus stock in such a manner that there could not be a legal liability against all of them for it" and answered:)

As he had said before he was in there so few minutes off and on—any discussion—he remembered it was assured around that it was all right and legal and it was all right, financially it was a good thing to do and legally and anything like that—he didn't know anything about it, and for one he didn't think so; and he didn't today either.

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Out of the five trustees the only one in the lot that had ever been to Alaska was French.

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(Witness was asked: "It has been stated here Mr. Rosene that that million and a quarter of common stock which you spoke of as the bonus going to the promoters, was issued, so far as appears on the books—to you—do you know anything about that." and he answered:)

"No sir."

That he never received it, never saw it. Did not know where the certificates were. That if counsel wanted his opinion as of where those certificates are, that is where they are, turned over to A. A. Housman & Co. but he didn't know. He had never had them in his possession;

He had never, in person, transferred them, if they were issued in his name; but Mr. Henderson had a power of attorney from witness for the purpose of transferring such shares, and what he may have done witness didn't know.

If they were transferred in witness' name and transferred in witness' name to somebody Henderson was the only one that was authorized to do so, but witness didn't know anything about that. Witness never saw them and had nothing to do with them.

Personally witness had never voted this stock at any stockholders' meeting or issued any proxy to anybody else to vote it at any stockholders' meeting.

Didn't know whether this stock had been voted by Housman & Company at stockholders' meetings.

That he left New York after their transactions somewhere about the 22nd or 23d of March just as soon as possible to get away, even before they were finished—they were still working there.

The organization of the plaintiff company came up after he reached New York. They all took place in New York.

That he never conferred with the board of trustees of the defendant with regard to that organization.

It was impossible to do so, because up to the time Mr. Myers came out of the St. Regis witness did not have any idea of anything happening. After he came out and they commenced to send for McConnell they were going at what you might call a sixty rate speed, and witness did not know what might happen next, so he did not say anything to the directors of defendant, because there was nothing tangible to say, because he did not know what the next move would be from day to day, and it was only in the last few days he was there that the thing took place.

He was present in September, 1906, at the board of trustees' meeting of defendant when a resolution was passed authorizing him to make a subscription for $125,000 in plaintiff company.

(Witness was asked what he did about it and answered:)

That he presumed it would be difficult to express that; in one sense what they authorized him to do he had already done without their authority; in the second place the only thing he did in compliance with it he explained that situation to Mr. Housman and Mr. Davis in Mr. Housman's office, and Mr. Henderson after witness came to New York, probably about two weeks after that meeting was held in Seattle.

He told—well Mr. Davis was fully aware of that situation, since he was here in that spring and he had gone to Europe for the purpose of telling Mr. Housman about it, so Mr. Housman was aware of it. Those two gentlemen themselves told me so.

Davis was president of plaintiff at that time. Housman was treasurer. Henderson was secretary.

The directors of plaintiff at that time were these three gentlemen and himself and Mr. Pierce; he didn't think French was a director at that time, he thought he had been relieved.

When he told them about this September resolution they simply said "That is all right. We have to cancel several more" and they did cancel several more, but it did not make any difference—"It is all right, John"—that is all they said.

At the time he had the talk in New York with Housman, Davis and Henderson, in the fall of 1906, $125,000 had been paid to the plaintiff from the funds of the defendant, either by cash or by crediting the plaintiff on its account, but it had not been paid in any consideration of an indebtedness. It had not been paid as a consideration of an indebtedness exactly—more as an emergency.

That Henderson, Housman and Davis were at this meeting and that they composed the board of trustees together with himself and Pierce.

Davis, Housman, Henderson and himself were present.

(Witness was asked: "You four together with Pierce constituted the board" and answered:)

He was not sure but there was a man named McLaren that came into that board after he was away in the spring or while he was in Alaska in the summer—but he never met Mr. McLaren—never saw him; he was not present at that meeting but witness thought there was——.

That was the same Pierce that was an employee in Housman's office and whom he said was a director.

It was said and agreed and understood between witness and those gentlemen, that the $125,000 would be accepted as a final—payment from the defendant, that there would be no more demands made—that it would square the account.

Mr. Davis died when witness was in Europe in 1910, he would say very close to Christmas, 1910.

Arthur A. Housman spoken of died two or three years prior to that. He would say it was in August, 1907, it might have been

in 1908, was not sure—one of those two years—one or the other.

Henderson died—it will be three or four years next Christmas.

CROSS EXAMINATION.

Q. (Mr. Gorham) Mr. Rosene, when you went to New York in the winter of 1905 and 1906, was it in December 1905 or in January or February, 1906, I did not quite understand you?

A. I left Arrowhead Hot Springs down in California on December 18th.

Q. And you arrived in New York when?

A. Well, we had a snowstorm coming up towards Washington and we stopped one day and we stopped in New Orleans one day, and so I would probably say it was very close to Christmas or the day after, but I think it was one day before.

Q. And had you at that time heard of these mining claims that are referred to in the minutes of the development company as conveyed to the development company for the issuance of the common stock?

A. I had not.

Q. You had not heard of them up to Christmas, 1905?

A. That is in detail so as to have any knowledge. Of the Kougarok mining district as a whole, I have heard many things many times.

Q. This group of claims as a group seeking a market?

A. No, I had not.

Q. When did you first hear of this particular group?

A. Well, that is a difficult question.

Q. How soon after your arrived in New York?

A. I met Major French outside of the office of J. P. Morgan, one of the first days I was there and I had a conversation and he said something to me and, but whether he said mining claims or not I don't know. As far as I know I think the first knowledge I really had of it was about three weeks after Mr. Williams asked me to have French become a director, and I agreed to do so. I went to Mr. French's office in Union Square and he presented me with a bundle of documents covering the Kugarok company and half a dozen of other companies, that I read them all through, and that

was the first time I had anything—what you might call a knowledge of it.

Q. And what did those documents consist of?

A. Well, they were plans for the Kougarok company and the subsidiary companies and the railway company from Kougarok to Port Clarence, things of that kind.

Q. What things; what else was included in those documents that Major French handed you?

A. I am rather inclined to think the railway surveys and a survey of some alleged ditches and water rights and things like that; I am not sure about that.

Q. Those all refer to a railway claim—I am asking you when you first heard of these mining claims, so far as this group of mines is concerned.

A. At the time I mentioned.

Q. At that time?

A. Yes.

Q. What papers were there, if any, handed you by Mr. French that had reference to this group of 171 mining claims?

A. Well, that is too much of a question to ask what papers in a bundle about twice as large as that book—just what particular ones was in there. He sat back in his office four hours reading those things through, and which was which I don't remember now. It was ten years ago.

Q. You remember very well there was some plans for the railway, cannot you refresh your memory a little and say what other papers there were that had any relation to these mining claims?

A. There was a general plan that the Kougarok Company was going to put in the mining company and in the mining claims and a ditch company to carry the water, and the Kugarok Company was to own the railway from the Kugarok to Port Clarence and that was the general purport of those papers, which I said was no good.

Q. Was there any engineers' reports handed you by Major French with respect to the mining claims?

A. Not at that time.

Q. When, if at all?

A. About two weeks afterwards.

Q. That would be when; let us fix the time.

A. Somewhere in January, 1906.

Q. What did those engineers' reports consist of?

A. Fairy tales.

Q. And who were the engineers?

A. Isaac Copeland and Wilkinson and I don't remember his name—Alling.

Q. You believed those fairy tales at that time?

A. I am sorry to say I believed them later on. I did not believe them then, but after I had read them two or three times and listened to them two or three times, I became convinced that they were true.

Q. There was Copeland and who else?

A. Wilkinson.

Q. And who else?

A. Alling.

Q. Wilkinson, Copeland and Alling?

A. Yes.

Q. You made some investigation with reference to their standing as experts and men of character and integrity, didn't you?

A. I knew Mr. Wilkinson, and I telegraphed to some friends in San Francisco about Mr. Copeland and they said they knew him and had known him thirty years and considered him a good mining engineer and believed he was absolutely honest.

Q. And from the investigation which you made touching the character of those experts, you were satisfied to rely upon their statement at that time, were you not?

A. No, I was not satisfied. That mining business was rushed on me there just the same as if you were standing on a track and seen a train coming on at forty miles an hour.

Q. I am not now referring to the speed with which the company was organized.

A. The whole business.

Q. I am referring to your inquiry touching the integrity and character as experts of those engineers, and whose report upon those mines you say you read over three or four times?

A. Well, I will have to answer that question in detail so as not to be misunderstood.

Q. Answer it in detail.

A. The first time, before I knew Mr. Wilkinson, I had a conversation concerning him with Frederick W. Baker of London, and Mr. Baker said, "Well, John, Wilkinson is a man that we send first. If he makes a good report or a favorable report wherever we send him, then we always send a higher class, a better man, and if he makes a bad report, then we are satisfied to leave it alone." So that I would call him an engineer in that class, which you can better describe than me. The only knowledge I have of Copeland was that in a conversation I found that he was supposed to be known with those friends of mine in San Francisco, and so I sent this telegram and got the answer. Alling I did not know anything about and I never heard of him.

Q. Did you make some inquiry as to Alling?

A. At a later time—probably at that time, I don't remember. Mr. McConnell was there and French was there and they were all anxious to get that $245,000 and they were pouring words at you like water, and just what was said at that time in reference to that I don't know. I don't remember those things.

Q. And when you had read those reports from the mining engineers, you agreed to consider the project of organizing a corporation to take over those mining properties if the engineers were ascertained by you to be reliable, were you not?

A. I doubt if that would be a correct construction of it; but anyway after I had read those mining engineers' reports and the statements, the blueprints and the thing that was there, it was a question in my mind if I had been correct when I declined to have anything to do with it. That perhaps there was a reason—

Q. You say you declined to have anything to do with it?

A. Yes, I had refused three times to have anything to do with it.

Q. Did you submit those reports to any other parties for their consideration before this organization?

A. Yes.

Q. To whom did you submit them?

A. Well, the principal ones where I left them and asked them to look them over and where I believe they did look them over was

Haldron & Company. I submitted them to Mr. Frederick Baker also. He had them perhaps the longest of any of them.

Q. And you were satisfied after the investigation as to the character and ability of those mining engineers and the reports you have received in reference to them—you were satisfied with the statements contained in those reports?

A. No, I was not. I was satisfied we were going too fast, and I said so. I was satisfied it was a good thing for the Northwestern Commercial Company to buy that railway, and that was the only thing I was satisfied about. The other things came where you are a minority in a crowd of friends and they are anxious to do something.

Q. You have testified concerning these reports before, haven't you, Mr. Rosine, in a suit by L. H. French against the development company?

A. Yes, I have.

Q. Your deposition was taken in New York, was it not?

A. There was no deposition I don't think. You people kept me down there for months and months, and you would not be in existence now if I had not gone there.

Q. Do you mean to say there was no deposition in the suit of Leigh H. French, plaintiff against Northwestern Development Company, pending in the Supreme Judicial Court, of the County of Cumberland, State of Maine?

A. I beg your pardon, Mr. Gorham—well, my answers there were verbal so that I did not regard it in the light you mean.

Q. They were written down, were they not?

A. I think they had all to be taken down to be sent to Portland.

Q. You know what a deposition is?

A. Yes.

Q. When I asked you if your deposition was taken, did you mean yes or no?

A. The transaction in New York was like it is here; I was asked questions. I had forgotten that they were written down to be sent away.

Q. Were you sworn to those answers?

A. I believe so, yes.

Q. And you understood at the time that you were being examined as a witness in that case, didn't you.

A. Yes.

Q. Counsel for the respective parties were present and examined you, direct and cross, didn't they?

A. Well, they were present one time and the other.

Q. Both counsel examined you, didn't they?

A. I believe so.

Q. And after you got through with your testimony, it was written out and you subscribed to it, didn't you?

A. If I was asked to, yes.

Q. And you then swore to the truthfulness of it, didn't you?

A. Yes, I expect so.

Q. T. A. Davies, the president of the development company, was present during all that time, wasn't he?

A. He was in Europe.

Q. He was not present when you gave this deposition?

A. Well, when you say he was there all the time, I know he made a trip to Europe and I stayed on there fixing up this testimony. I didn't know whether he was present.

Q. What fixing did you do with the testimony—how did you fix the testimony?

A. I don't understand what you mean.

Q. I am trying to find out what you mean by the language that you just used—you said you fixed up this testimony; what do you mean by fixing it?

A. Well, if I said that I don't know it.

Q. That was what you said.

A. Well, I don't know that—I don't know myself what that would mean.

Q. And you say that Mr. Davies was not present?

A. Mr. Davies was present while I was in New York, both before he went to Europe and after he came back.

Q. I am trying to find out whether he was present and heard your testimony.

A. You said all of it.

Q. All your testimony as given at that deposition.

A. I don't believe he was.

Q. You don't know?

A. No.

Q. You would not say that he was not, would you?

A. I don't believe he was—that is good enough for me.

Q. I show you a paper which I will ask to have marked for identification as exhibit GG, and I will ask you whether that is your signature at the end of page 175 (showing)?

A. I think it is, yes.

Q. Now, after you got those mining engineers reports—or was it after you got those reports that you interested Mr. Housman or before you got those reports?

A. I did not interest Mr. Housman. Mr. Housman interested himself in the manner I have already explained.

Q. He interested himself?

A. Yes.

Q. And then he interested Myers of London and Fisher of Dundee?

A. Yes.

Q. And Farquhar?

A. Yes.

Q. Where was Farquhar?

A. New York, although he is a gentleman more engaged in building railroads in Brazil than anything else.

Q. Do you remember of testifying at the hearing in the suit of French versus Northwestern Dovelopment Company, in the deposition I have referred to—you remember testifying?

A. Yes.

Q. And I will ask you if you stated during that deposition that you transferred these properties for $245,000 cash and the full issue of the capital stock, three million and three quarters?

A. I have already answered that question in my previous testimony.

Q. And you further testified at that New York deposition that you delivered to the treasurer two and a half million of that common stock?

A. Well, but not in the sense that I did so myself, personally.

Q. You caused it to be so done—it was in your name?

A. Well, that has all been explained. I had nothing to do with it. The stock was printed after I left New York. I never saw any of it. I could not say that I caused it to be done—but it was done by Housman and Henderson and those gentlemen, but I gave Mr. Henderson a power of attorney for such purpose.

Q. For that purpose?

A. Yes.

Q. So that you caused it to be done?

A. In that sense, yes.

Q. And you caused him to deposit with A. A. Housman & Company, besides the two million and a half of common stock for delivery to the preferred subscribers—you caused a million and a quarter of the common stock to be deposited with A. A. Housman & Company, didn't you?

A. Probably in the same manner, yes, sir.

Q. And you knew that it was there, didn't you?

A. I did not know, but I assume it was.

Q. You didn't know?

A. I didn't know.

Q. You know how that million and a quarter was split up in certificates?

A. I did not.

Q. Do you know what your interest was in it?

A. No, I don't think I could say definitely. I believe, approximately, forty per cent of the total. I don't remember. There was a memorandum that Mr. Housman prepared and that I had typewritten and signed and that covers it.

Q. You signed a memorandum?

A. That is my impression; that was done before I left New York.

Q. So that you were a party to the depositing of this million and a quarter of the common stock that was to be divided up between you and French and Housman, is that right?

A. Well, I don't know. I presume I was. There was no dispute over it. It was well understood it was going to be done and I think probably that agreement will explain it more than I can, and that was another hurry-up transaction in the last hour.

Q. But you were well aware before you left New York that you had an interest of five hundred thousand shares out of the million and a quarter in that common stock which was deposited with A. A. Housman & Company?

A. If that was the interest specified in the agreement, I was aware of it.

Q. And you were well aware that Mr. Housman had four hundred thousand shares?

A. If that was the interest specified.

Q. And that French had three hundred and fifty thousand shares?

A. Yes. Well, that would make up the total.

Q. Now, refresh your recollection, Mr. Rosine and tell us whether or not it was not agreed between you and Mr. Housman and French, and definitely agreed, that that should be the way in which this million and a quarter bonus stock was to be split up between you as promoters?

A. The definite agreement was specified in the agreement that I refer to.

Q. We have not the agreement now.

A. Well, you did have it.

Q. No, the development company has not got it.

A. I have seen it in the possession of the development company in New York.

Q. We have not got it.

A. I know you have it—that is, the development company.

Q. That is, you saw it in the possession of A. A. Housman & Company?

A. No, I saw it at the time of the trial you refer to.

Q. The trial in New York?

A. Yes.

Q. The taking of the deposition?

A. Yes.

Q. You mean that it was temporarily in the possession of the attorney for the development company at that time?

A. Yes.

Q. I am asking you as to whether there was any restriction placed upon that deposit with A. A. Housman & Company of that one million two hundred and fifty thousand shares of the common stock?

A. What do you mean by restrictions?

Q. What was it deposited with A. A. Housman & Company for; why was it deposited with them—why not split it up and issue it to the several parties interested in it?

A. I don't think that would come under the head of "restrictions". There was objection—I objected to it all the time. I did not want to have anything to do with it, because I thought it was a mistake to do that. I have refused from that time to this to have anything to do with it because I did not think it was the right way to do it, but beyond that there was no restrictions. I don't know —the stock was not printed when I left New York, and not probably for some days afterwards. I remember having letters from Housman in which he told me that the office was working night and day and fixing up the stock certificates; but that was after I came out here. I don't remember whether there was anything that would come under the head of restrictions excepting that as far as I was concerned, I did not want it.

Q. The transfer books which have been introduced in evidence show the original issue of the common stock, and show it in one certificate, or show it in eight or nine certificates for the directors and signers of the articles of incorporation, and the balance of the common stock, some three million seven hundred and forty-nine thousand and some odd dollars, was issued in one certificate to John Rosene; that certificate was surrendered and two certificates—one certificate was in the sum of two hundred and fifty thousand dollars in A. A. Housman & Company's name for the benefit of the subscribers to the preferred stock—no I am mistaken in regard to that —the original certificate was seven hundred and forty-nine thousand, nine hundred and eighty-nine shares in Rosine's name, that, together with the eleven shares to the incorporators made the seven hundred and fifty thousand shares of common stock, which at five

dollars a share would make three million and three quarters. Now, that certificate issued to John Rosine for seven hundred and forty-nine thousand odd shares was an original issue and it was split up so that A. A. Housman & Company, for the benefit of the subscribers to the preferred shares, got five hundred thousand, which would be two million and a half dollars, and John Rosine got the balance in three or four certificates—three certificates, I think, aggregating—

MR. GRAVES: Your testimony is quite extensive, Mr. Gorham.

Q. (Mr. Gorham)—then the certificate for seven hundred forty-nine thousand odd shares was split up so that John Rosine got three certificates of one hundred thousand, eighty thousand and seventy-five thousand, and Housman & Company got four hundred and ninety-nine thousand, nine hundred and eighty-nine?

THE WITNESS: Are there any dates to those transfers?

MR. GORHAM: April 2nd.

THE WITNESS: Well, I was in San Francisco at that time and I could have no more to do with it than you.

Q. Why did they have to work night and day to issue a dozen certificates—that is what I am getting at?

A. If Mr. Hartman was here and could produce the letter from A. A. Housman & Company with that statement in it, and that probably gives the reasons, but I don't remember.

Q. But that was not referring to this dozen certificates?

A. Those details I don't know the first thing about. I never paid any attention to them and I never had any knowledge of them.

Q. You never had any knowledge of the certificates for a million and a quarter in your name that was deposited with Housman & Company in trust for the promoters, consisting of Rosine, Housman and French—you now say you did not have any knowledge of that?

A. No; that probably is putting it too strong, because when I came back the next fall and the following year I may have been told of such a thing.

Q. Didn't you have any knowledge of it before you left San Francisco?

A. How should I know what they did before it was printed?

Q. Didn't you have knowledge that that was to be the method?

A. I had that understanding—not the knowledge.

Q. That understanding—that agreement?

A. Well, I had that understanding—agreement if you like, but I could not know anything about something that had not taken place.

Q. Didn't you write a letter to Housman & Company when you deposited that stock, requesting them to hold that stock, all of it, for you—that bonus stock?

A. If there is such a letter, it will speak for itself, I don't remember.

Q. You don't remember?

A. No.

Q. Did you so testify at this hearing in New York?

A. I might have—if there is such a letter.

Q. And if you did, is it true?

A. If there was such a letter and it was before me in New York, it would have been true, yes. I don't say that I didn't write such a letter. I don't remember it.

Q. But you are very emphatic, you say you do not know anything about the bonus stock coming to you.

A. I never said that. I said I did not want it to come to me.

Q. But you accepted it just the same.

A. I did not—I never accepted it—I never saw it.

Q. You authorized its acceptance?

A. Well, if it complied with the wishes of friends I may have done that in a Pickwickian sense, but not in an actual sense.

Q. And this letter which you addressed to Housman & Company, directing them to hold the million and a quarter of stock that was to be split up between the promoters, was that in a Pickwickian sense when you requested them to hold it for a year?

A. If there is such a letter, Mr. Housman prepared it and had me write it—I only complied with their wishes in the matter—like the other papers.

Q. Is that all?

A. Yes.

Q. There was some dispute between you and French, was there not?

A. No.

Q. In that year?

A. No.

Q. No dispute at all?

A. No.

Q. No dispute in reference to this stock?

A. What year?

Q. 1906, in reference to this bonus stock, this promoters' bonus stock?

A. I don't believe there was, Mr. Gorham. I don't think so but I would not be sure—I don't see how there could be any such dispute.

Q. I will ask you if you testified at that hearing in New York to this effect, that the method of procedure concerning the issuance of stock to me for the mining property was suggested by the attorneys and agreeable to all concerned?

A. I beg your pardon, I didn't get that.

Q. Did you testify at that hearing in New York that I have referred to, to this effect: That the method of procedure concerning the issuance of the stock to you for the mining properties, that is three and three-quarter million, was suggested by the attorneys and agreeable to all concerned?

A. Well, I don't see any difference in that from what I said, because since I acquiesced in it, it was agreeable to me, I presume, and it certainly was agreeable to the rest.

Q. Well, answer my question.

A. I don't remember the testimony. You had me there for a specific purpose, you remember, and it is not very fair to bring such a thing in this case here. I was there to defend your company's very existence against a very bad attack. You framed the answers and I answered them as true as possible; and to bring that up here is small business.

Q. You did what—let me hear that answer.

(Whereupon the stenographer repeats the answer of the witness.)

Q. You refer to me personally, that I framed those answers?

A. No, sir; I refer to the Northwestern Development Company.

Q. I was not present?

A. No, sir.

Q. I was not attorney for the company at that time, was I?

A. That I don't know.

Q. But you say that you submitted to allowing the attorney for the development company to frame your answers at the taking of this deposition and that they were as truthful as you could make them under the circumstances; is that what I understand you to say at this hearing now?

A. Well, I don't know that I said that, but what I mean to convey is this, that here you are dealing with a large scope of matter, and they had testimony there, or rather the complaint of Mr. French, that was pretty large and used all formal language. The only one that was able to defend your company so that French would not take possession of all you had, was me, because I was the only one that had knowledge of it. Now there was half a dozen ways that you could have answered any one of the questions and still stick to the truth, and the purpose there was to defeat French, because he was wrong.

Q. He was wrong?

A. There was no question about it. There was the purpose—to tell the truth, but to tell the truth in such a manner as to produce the desired effect, and now you are bringing it up here where you are dealing with an opposite question altogether, and trying to pin me down. I never answered anything in my life that was not true and I will not for money or anything else.

Q. I have not intimated that yet; I am trying to reconcile what you say now with what you said then, and we will let the jury determine whether it is reconcilable or not.

A. All right. I had my say.

Q. Then you do not mean to say now that your answers at that time contain any element of untruth, do you?

A. Not so far as I know, no.

Q. Didn't you state at that hearing as follows, in answer to the question:

> "Q. 281. As a matter of fact, Mr. Rosine, under this agreement did you not get five hundred thousand dollars worth of stock, Mr. Housman four hundred thousand dollars worth of stock and Major French only three hundred and fifty thousand dollars worth of stock for the good will of the proposition of Major French aside from the fact that Mr. Housman was to act as fiscal agent for one year free and was to loan the company fifty thousand dollars?"

Didn't you testify at that hearing in answer to that question, as follows:

"A. No, those statements are wholly incorrect. The stock I received was in payment of the mining properties and not for any good will and Mr. Housman did not loan any money to the company."

A. I don't remember; the testimony will speak for itself.

Q. And was it true, if you so testified?

A. Mr. Housman did not loan any money to the company; he loaned fifty thousand dollars to me for the purpose of organizing the company.

Q. Was it true if you so testified, that the stock which you received was in payment of the mining properties?

A. You are trying to put one construction to suit this purpose here and they were trying to put another construction to suit their purpose there.

Q. Well, was it true?

A. I don't remember anything about the testimony.

Q. Well, was it true?

A. Which?

Q. That statement, that the stock you received was in payment of the mining properties?

A. After the transaction first took place where the lawyers made up all those papers that I have never seen, where Mr. McConnell transferred those things, these claims to me and then afterwards I immediately transferred them to the company and after I had gone away, a week or so afterwards, they issued this stock and that was transferred and handled in my name in my absence, if that is the correct transaction, that would be true.

Q. You knew you were receiving this stock in payment of the mining properties?

A. I knew there was such a transaction going on. I don't know whether I received it—I never did receive it—I never had anything to do with it—I never saw it.

Q. Didn't you testify at that hearing that you believed that the preferred stock was worth par?

A. I don't remember any such testimony, but that might have been and it might not, I don't know.

Q. Was it true, if you so testified?

A. Which?

Q. That you did believe that the stock at that time was worth par?

A. At what time?

Q. The preferred stock?

A. At what time?

MR. BOGLE: I object to that statement; he said he did not

know whether he made it and the question if he made it is it true and if he believed such and such a thing.

MR. GRAVES: Why don't you let the witness see it?

MR. GORHAM: You can let him see it when you come to your examination, Mr. Graves.

(Question repeated to the witness.)

THE COURT: Let him proceed. Note an exception.

Q. (Mr. Gorham.) At the time of the organization of this company, and after the conveyance of these mining properties to the company for the common stock.

A. Well, if I believed the stock would be worth par? If it had been paid in cash and used for the purpose intended, that is buying the railway and buying these mines, as far as the preferred stock is concerned, yes, I undoubtedly believed it or otherwise it would have been a stupid transaction to engage in.

Q. You were one of the chief promoters of this entire scheme?

A. I was not. I was the very tail end of it and I am sorry to say I found that was too much.

Q. Did you consider you were a mere figurehead?

A. Worse than that.

Q. And didn't you—

A. (Interrupting) I was buncoed, if you want to know.

Q. And didn't you testify at that hearing in New York that I have referred to, that you would not consider that you had acted as a figurehead.

A. Well, I have answered the question—they were framing questions—I don't remember.

Q. You don't remember?

A. I don't remember.

Q. If you did so testify at that hearing, was it true then?

A. I don't think so. That would have been a mistake.

Q. It would have been a mistake?

A. A mistake.

Q. Didn't you testify that you believed that the project, this project involved in this organization of this development company, would become a great success?

A. I believed that from the time we were organized and up to August, 1906, when I began to find out that we had been swindled.

Q. You believed it up to that time, that it had become a good financial success?

A. I don't know anything about "great," but a success.

Q. Didn't you testify at that hearing that you believed that it would become a great success?

A. I don't remember.

Q. And if you so testified, was it true then?

A. I have already answered. I don't see the application of the "great."

Q. Was it true or not?

A. I believe it was true that I believed it to be a success, yes.

Q. Did you testify you believed it would be a great success?

A. I don't remember.

Q. If you did so testify, was it true at the time?

A. I don't remember that even.

Q. That is not a question of memory, that is a question of fact.

A. Well, when you want to draw the distinction between "great" and—

Q. Didn't you testify at that hearing that, according to those mining engineers' reports in which you had confidence, there was not less than fifty million dollars in gold locked up there in the frozen ground in those mining claims which you conveyed?

A. Well, that was the purport of the report, showing such a state of affairs to exist, but it did not exist.

Q. It did not exist, it was determined afterwards?

A. Yes.

Q. But you believed it at that time didn't you?

A. Well, I was better than half persuaded to believe it. I was doubtful, but still there was evidence of competent engineers, reliable engineers making the statement. They had blue prints and things to show for it. I believed it, yes, I thought so.

Q. How is that?

A. I believed it at the itme, yes.

Q. And it was upon the faith and credit of that statement in those engineers' reports that there was fifty million dollars of gold locked up in those mining claims that this whole organization was launched?

A. I don't think so, because there was an engineer named Holden called into Mr. Housman's office and he turned cold water on it and he said it was not a good report and we should not have anything to do with it, but those fellows concluded to go ahead.

Q. You did not act on his report, did you.

A. No, it seems not.

(Whereupon a recess is taken until 1:30 p. m.)

November 30, 1915, afternoon session 1:30 o'clock P. M. continuation of proceedings pursuant to recess, all parties present as at former hearing, names of jurors called, all present.

JOHN ROSINE, same witness, resumes the stand for

FURTHER CROSS EXAMINATION,

Q. (Mr. Gorham) Mr. Rosine, was there a prospectus issued on behalf of the development company prior to the organization?

A. No, I think it was done after the organization, shortly afterwards, because they balled it up pretty handsomely after I left New York.

Q. How?

A. They balled it up pretty handsomely after I left New York.

Q. It was issued after you left?

A. Oh, yes.

Q. You never saw the prospectus?

A. Afterwards, yes.

Q. You saw it afterwards?

A. Yes.

Q. You never issued it?

A. Oh, no, no.

Q. And whose name was signed to it when it was issued?

A. I wrote a little memorandum and signed my name to it before I left, just three or four paragrapths, and then the clever Major French stuck it on behind there so that to me it looked like I wrote the whole thing.

Q. Then you signed something before you left New York?

A. I signed a memorandum record.

Q. What was the contents of that memorandum?

A. I believe it all related to the Kugarok in a general way, I don't remember though.

Q. Was it not a prospectus setting forth the plan of organization of this development company?

A. I believe that was in the prospectus, but I had nothing to do with writing that. They made a fudge there, like they did with several other things—by putting my name in such a form as if to indicate that I had done it when I had nothing to do with it except writing certain parts. If you have the prospectus I will show you what I wrote.

Q. At this hearing in March in New York, the hearing of Leigh H. French against the development company, were you shown a copy of that prospectus, or the original at the time you were on the witness stand?

A. I don't remeber, I could not say.

Q. I will ask you if at that time this question was propounded to you and this answer given by you:

"Q 16. I now show you a prospectus entitled 'Northwestern Development Company' and ask you to have same marked for identification. Show whether or not you signed this prospectus, dated New York, March 8th, 1906, as authority for having same printed. A. I signed the last page."

Is that right?

A. You will pardon me, Mr. Gorham, I am very sick or you would not have any fun of that kind, but what I said now was of the same kind. I signed the part that I wrote myself before it was printed. After I had left New York they took advantage of my absence so as to make it appear that I was the author of that whole prospectus. That was not true.

Q. Was this your statement?

A. I don't remember that. If you will notice it—

Q. This is question 16 and your answer to it.

A. If I would look at that I could not remember it.

Q. You would not know any more about it?

A. No.

Q. Was that true at the time you so testified, if you so testified?

A. Which was true?

Q. The answer which you made to that question.

A. I don't remember the answer.

Q. "I signed the last page."

A. Yes, sir, but that could be misconstrued so that it would not be the truth.

Q. Was this question at that time and place propounded to you and did you give this answer:

"Q 17. State whether a proof of this prospectus was ever submitted to you and if so whether or not you initialed each page thereof as O. K. before same was printed? A. I don't remember; probably it was."

Did you so testify at that time and place?

A. I don't know.

Q. And if you did so testify, was it true?

A. Well, that is neither negtaive nor affirmative and I don't see where it changes it any.

Q. Answer my question.

A. I don't see where there is any answer to that.

Q. No answer?

A. No.

Q. You haven't any answer?

A. No, not to that. It seems to me I can't answer it.

Q. You understood it sufficiently well to answer the question?

A. I will tell you, I had ptomaine poisoning last night. I was very sick and I asked Judge Bogle not to come down today. I could do easily with you last week but I am suffering too much. You were trying to collect a million dollars there or to prevent paying a million dollars at that time, and now you are trying to collect one hundred and twenty-five thousand dollars—two opposite facts.

Q. You admitted the French claim was not a legitimate claim?

A. You could not defeat it, though, without me—he would have made it legitimate.

Q. Did'nt you testify at that time and place, in response to question number 40, which is as follows:

"Q 40. I now refer you to pages 20, 27, 28, 29, 30 and 31 of the report already marked for identification and to page 5 of the prospectus already marked for identification and to the matter contained under the following sub-heading: 'Mr. Mark M. Alling, mining engnieer, of Stockton, California reports as follows.' I ask you to examine the matters in the prospectus under the heading referred to and if you find that it is an absolute extract from the reports already marked for identification, and if you find that the report of Isaac Copeland on page 4 of said prospectus is an absolute extract from the said report and if you find that pages 6 and 7 of said prospectus entitled 'Mr. E. M. Wilkinson, civil engineer of San Francisco reports as follows:' is an exact extract from the reports already referred to and continued particularly on pages 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44. Will you please explain your answer to question 365 given in your deposition taken January 26th, 1910 which question is as follows:

'Were you the person who originally formulated and presented to Major French the project of the Northwestern Development Company? A. I was the person who originally presented it to him'."

That is the end of the question and this is the answer:

"A. The prospectus states for itself that it is an extract from the reports of those mining engineers and in the answer to the question you refer to, I did not mean to convey the impression that it was I who had formulated the mining part or the mining operations of the Northwestern Development Company. What I meant was that it was I who came to Major French with the proposal of the organization of the Northwestern Development Company and that he did not know anything about the organization of that company, excepting from me, when I spoke to him about arrangements made with Mr. Houseman."

Did you so testify in answer to that question. Answer yes or no, please and then explain afterwards.

A. I presume I did, because if it is explained, the real facts, namely of the change from French's Kugarok Company to Houseman's Northwestern Development Company, French did not know anything about that develpoment company until after the arrival of Mr. Myers from London, and those discussions and the gentleman from Boston had come down and was told, but of course the scheme, as far as the mining claims and figuring on the railway, only he wanted the Kugarok—he had been at that for more than a year before I knew anything about it.

Q. Were you not asked this question at that time and place:

"Q 158. Had you ever heard of these particular propositions made in the prospectus of your company before you met Major French?"

And did you not answer it as follows:

"A. As far as the mining properties were concerned, I had heard of them in a general way as it was common report that the Major was trying to promote them."

As that answer reads, did you so testify?

A. I told you I met him in front of J. P. Morgan's and he gave me some idea of that as soon as I arrived in New York, but that was not detailed knowledge of any of the matters.

Q. Didn't you testify at that time and place on that occasion, in response to the following question and give the following answer. I shall read them:

"Q. 196. Is it not a fact that at the time that you paid this twenty or twenty-five thousand dollars that Major French stated to you that now that you had made a payment to him for the promotion work of this company, that you were to consider that all of these mining claims, surveys, reports, location notices, water rights and all of the other things which comprised his whole proposition were now subject to the order of the Board of Directors as soon as the company was incorporated, and that he desired that the corporation be completed as soon as possible, or in substance that? A. No, that is not correct. Major French did not make such a statement. The proposition on which I agreed to go into the project was that the Port Clarence part of the project would be eliminated and that I would have nothing to do with any of the properties except those that had been reported on by Copeland, Alling and Ashford."

Was that question put to you and did you make that answer?

A. I don't remember.

Q. Was it true, if you made it?

A. Approximately, yes.

Q. Were you asked this question and did you make this answer:

"Q. 214. At these various meetings, held before and after

the incorporation of the company, was it not generally understood and agreed between the parties at the meetings and was it not fixed as to whom should be the officers? A. The selection of officers of the company was entirely left to me and was made by me personally with the exception of one officer, that is the first vice-president; I think it was one Kenneth K. McLaren. His election was selected by Mr. Myers and Mr. Farquhar. But generally speaking the list of officers was left to me."

Did you make that response to that question at that time and place?

A. Mr. Feiner made those questions for me.

Q. Did you answer that question as I have read it?

A. Surely, to protect and cover Mr. Houseman.

Q. Was it true at the time you made that answer?

A. In an indirect form, yes, sir.

Q. What part of it was untrue?

A. If Mr. Houseman would not have agreed to be a director, I could not select him any more than if I would not agree to he could not select me. That thing was done, as I explained to you, in a hurry.

Q. "The selection of officers of the company was entirely left to me," is that true?

A. In an indirect sense, yes—not in the way you are trying to make it appear.

Q. Did you intend to deceive the Court in this proceeding by an answer which had an equivocal meaning?

A. No, we intended to shoot at the mark, and instead of your shooting at the mark, you shoot—instead of your shooting at the mark you shoot from it—we tried to shoot the mark. Mr. Feiner prepared the bullets and I did the shooting. We stuck within the truth all right.

Q. I show you a paper which I will ask to have marked as exhibit HH for identification and I will ask you to read that (showing).

A. Yes, I can read that for you (reading).

"Mch. 2nd. 6.

Major L. H. French,
31 Union Square, N. Y. City.

Dear Sir:

This is to confirm verbal arrangements as follows:

1. That out of the $245,000 cash due to me from the Northwestern Development Company I shall pay you the sum of $31,000, to reimburse you for moneys expended by you on that Company's mining properties.

2. That out of the allottment of $1,250,000 par value of

the Northwestern Development Co's stock I shall transfer to you $350,000 par value for past and future services; the condition of this part of the agreement being that the entire block of $1,250,000 par value for this common stock so allotted to me shall be on deposit with A. A. Housman & Co. for a period of one year from this date. Yours very truly,

Accepted: (Sgd) J. R."

Q. Is that the letter—was that letter addressed to Major L. H. French, signed by you of that date and delivered to him?

A. I don't know.

Q. You don't know?

A. You can serve that as an alleged copy.

Q. That is simply a copy.

A. Somebody made that, I did not make it.

Q. Do you recognize the contents of the letter, that is what I want to know?

A. I don't recognize anything about this $31,000. I could not answer that question. The rest of it about the $350,000 of that common stock, you have already got introduced here as being the fact and I don't know, but I think it is probably correct—does that make up the $1,250,000?

Q. You think that is a true copy of the letter?

A. I don't know anything about it—I don't think anything about it.

Q. I will ask you, Mr. Rosine, if at the hearing of the taking of your deposition in the suit of French vs. the Northwestern Development Company, which I have heretofore referred to, at New York on the 26th day of January, you were asked this question:

"Q. I show you a copy of a letter which has been marked 'Defendant's Exhibit Number 1' Adeline Sessions Notary Public, January 26, 1910, and I will ask you whether that is a copy of a letter which you wrote to Major French reciting in part your arrangements with him to which you have already testified?"

To which you responded:

"A. It is.

Was there such a copy of the letter submitted to you and did you make such answer?

A. I don't remember anything about it.

Q. I will ask you if this question was put to you and the response made by you at that time and place, January 26, 1910, as follows:

"Q. Will you read that letter. A. (Reading) 'March 2nd, 6. Major L. H. French, 31 Union Square, N. Y. City. Dear Sir. This is to confirm verbal arrangements as follows: 1.

That out of the $245,000 cash due to me from the Northwestern Development Company I will pay you the sum of $31,000 to reimburse you for moneys expended by you on that company's mining property. 2. That out of the allotment of $1,250,000 par value of the Northwestern Development Company's stock, I shall transfer to you $350,000 par value for past and future services. The condition of this part of the agreement being that the entire block of $1,250,000 par value of this common stock so allotted to me shall be on deposit with Houseman & Company for the period of one year from this date. Accepted. Yours truly, J. R.' "

Did you make such response to that question?

A. I don't remember.

Q. If you did, was it true?

A. Since I don't remember whether I made it, I can't answer that question. Most of the things are in there just as in accordance with the recollection as I remember the transaction, only I don't remember anything about the thirty-one thousand dollars, but I do remember that French had some of those notes that McConnell got, and had some drafts that he collected through Housman & Company. Your books will show.

Q. Is there anything in here that is not true?

A. I don't know anything about the thirty-one thousand dollars. I don't know whether it is true or not.

Q. Were you asked this question at the taking of your deposition in the French suit above referred to on March 8, 1910:

"Q. 232. Did you consider this a personal agreement between you three, in which the company had no part?"

And did you make this response thereto:

"A. I did consider it a personal agreement between us three in which the company had no part, except that it was known that I was to receive the stock from the company in payment of these mining properties and it was well known by all of us three what each one's proportion of that stock was to be."

Was that question put to you and did you make that answer in response thereto?

A. I don't remember again.

Q. If it was, was it true?

A. Yes, on the basis that you remember that this payment on mining property stock was a fictitious transaction by legal lights, which I was only a medium to confirm. In its real sense, the only thing we paid for the mining property was $245,000—no more and no less—and the shares that were issued in this manner, that is the suggestion of the lawyers, was not issued in payment of the mining properties, because I thought it was issued all together for the whole

purpose. It shows for itself in the way the stock was handled, and so I don't see where it is necessary for me to explain it. It is quite evident what took place.

Q. And were you asked at that time and place, March 8, 1910, as the witness, the following question, and did you make the following answer thereto:

"Q. 283. Will you explain why it was that you who were acting merely as a figure head in the transaction and by this I do not wish to question the value of your connection with the company as far as its future prospects were concerned, but how you got more stock than either Mr. Housman, who was to loan the company fifty thousand dollars and act as fiscal agent for one year and one hundred and fifty thousand dollars more of stock than Major French who was the Father of the enterprise? A. In the first place, seeing that I secured the first $300,000 of the Company's capital, I would not consider that I acted as a figure head, and in the second place, in order to carry out all the plans of the project, it became necessary to incorporate the Seward Peninsula Railroad Co. and I had to ask my associates in Seattle, namely, Mr. Trenholme and Mr. Williams and Mr. Perkins to become officers of that Company, and furthermore, Mr. Trenholme became the assistant treasurer of the Northwestern Development Co. and the actual disbursing officer for that Company at Seattle. Mr. Williams became the President and Col. Perkins the Secretary of the Seward Peninsula Railroad Co. and all three of these gentlemen rendered valuable services and did very much work for the Northwestern Development Co. for a period of about two years, for which they received no compensation whatsoever, but I expected to compensate them for these services by giving them a portion of my shares and I did not expect to retain over $250,000 par value of these shares myself, and therefore, I would actually receive the smallest part of this common stock as between Major French, Mr. Housman and myself."

Was that question propounded to you and did you make that answer at that time and place?

A. Well, since I can't remember the short ones, why that would be too long, but the general trend of the story in there is approximately correct, and I have no doubt Mr. Feiner prepared such a question and answer, something like that, or nearly like that.

Q. Referring to the common stock, were you asked this question:

"Q. 288. Was not the stock worth par at that time?"

And didn't you make this answer:

"A. It was believed to be worth it, but it was not."

A. Well, now, that is one of those questions, Mr. Gorham

which can be misconstrued. I don't know whether I made such an answer or not; but you can put it that way—the stock was not printed; nothing was selling. We had a program before us waiting, and my opinion of that program was that it didn't amount to very much, but when you say, "How much did I believe that each one of those five hundred thousand shares was worth," I don't think I ever gave that a thought.

Q. You remember about that stock being pooled for one year, since I read those questions and answers?

A. I remember what you read, but I don't remember anything about it, but I have an idea that is correct, because I made objection first to the transaction, and afterwards I received it.

Q. You remember this letter was written by you to French March 2nd, 1906?

A. I don't remember anything of the kind.

Q. Well, when was the letter written?

A. I don't know that it was ever written—I have no such recollection.

Q. But you have testified this morning that there was such a letter, and asked me to produce it.

A. Will you show me that testimony of mine.

Q. It is in here.

A. I don't remember that. I don't think it is correct. We are of a different opinion there, but you showed me a copy of a letter that I did not know anything about, but the facts in the letter are approximately correct, excepting the thirty-one thousand dollars, and that might also be correct—I don't know. You have my papers to show whether it is correct or not—if you give them to me I can answer your question.

Q. How have I got your papers?

A. Your company has my checks, the notes which you borrowed six years ago; if you give them to me I can answer.

Q. They went in as exhibits in this deposition?

A. Probably you got them for that purpose anyway.

Q. Now, did you pay any part of this $245,000 to McConnell for this mining property, and, if so how much?

A. What took place in New York with that $125,000, I don't remember now, Mr. Gorham, exactly. It is pretty hard to go back to that. French was the one, in a general sense, that received it, but then McConnell and he watched one another. I know that after I came here from San Francisco Mr. McConnell came here and presented me with one or two of those notes before they were due, and I gave him my individual checks in payment thereof, and I loaned you the checks.

Q. Tell me what was the first payment made to French on this transaction by you?

A. Twenty thousand dollars, I think.

Q. When was that made?

A. Well, that was when I swallowed the first bait—I should think it was somewhere about the first of February, but I am not sure about that.

Q. And when did you make the next payment?

A. To whom?

Q. To French or McConnell, or when did you make the next payment for this property to whoever owned it?

A. Some money was paid in New York, that was before I left there; that would be, approximately somewhere between the 10th and the 25th of March, although it might be a day off, too.

Q. How much?

A. I think I told you I didn't remember. The checks will show. You have them. You borrowed them and if you return my property I can answer your questions.

Q. You mean me, personally?

A. I mean your company.

Q. You don't mean that I am the person—I want the jury to understand that—did you pay McConnell your individual check on March 15th for $93,000 on account of that transaction?

A. If there is such a check in existence, undoubtedly I did.

Q. Don't you remember?

A. I don't remember even the date or the amount.

Q. That would not impress itself on your mind, an account of that size?

A. That was not very much of an amount. I had dealings with larger figures every day, I am sorry to say, and that was not anything extraordinary.

Q. Did you next pay, on that same day, did you give McConnell notes for one hundred thousand dollars, March 15, 1906, on this transaction which you had in reference to these mining claims which were conveyed to the development company?

A. I don't understand that question—I don't believe I understand that question.

Q. Did you give McConnell, on March 15, 1906, in addition to the ninety-three thousand dollars cash, or by check, did you give him your note for one hundred thousand dollars?

A. My recollection was, as I already stated here in the testimony today, that I gave him and French both notes, my own notes, for one hundred thousand dollars.

Q. March 15, 1906?

A. Well, I could not state the date.

Q. You could not state?

A. No, some time in March, I know that.

Q. Was it prior to the organization of this company, or subsequent?

A. Well, if you have one date, March 15, and the records there, you can answer that better than I can.

Q. I am asking you.

A. I don't know, I don't remember.

Q. You don't know?

A. I would not even try to.

Q. How were those notes paid, one or more notes for the one hundred thousand dollars?

A. There again you have the evidence. I remember distinctly that Mr. McConnell came to me, I think maybe before they were due, I am not sure, but anyway shortly after coming here, and I paid him one or two of those notes, I believe it was two, and at some little inconvenience to myself, too.

Q. Now, do you remember of testifying in this French suit which I have above referred to, on March 8, 1910, in New York, that you gave French your check for twenty thousand dollars in February?

A. I think I already said so; it is my impression today.

Q. And that you gave McConnell your check on March 15, for ninety-three thousand dollars?

A. When those questions were made, Mr. Gorham, and the answers, I had the checks before me and it was not difficult to answer them correctly. Now you have got them and you are asking me questions for the purpose of confusing me.

Q. I am not trying to confuse you, I am trying to get the facts before the jury.

A. The checks are the best facts.

Q. Then the testimony in this record here that the first payment to French was twenty thousand dollars on February 7, 1906, and the payment of ninety-three thousand dollars to Mr. McConnell on the 15th of March, 1906, a payment of twenty thousand dollars to McConnell on the 2nd of April, 1906, a payment of twenty thousand dollars to McConnell on the 31st day of May, 1906, a payment to McConnell of twenty-four thousand dollars on the 1st day of June, 1906, a payment to French on the 22nd day of May, 1906 of six thousand dollars, a payment of twenty thousand dollars to French on the 1st day of June, 1906, a payment to French of ten thousand dollars on the 1st day of June, 1906, a payment to French of seventeen hundred dollars on the 29th day of May, 1906,

a payment to French of twenty thousand dollars on the 14th day of May, 1906, and of ten thousand dollars on the 15th of August, 1906, I will ask you whether that recital of payments is correct?

A. I don't remember. The only other one that I could not—that I can't reconcile, is the April 2nd, because on April 2nd I was in San Francisco.

Q. You will find those beginning on page 157 of this record.

A. If I read it I can't answer—I am not a bookkeeper—I didn't keep the records. At that time you people furnished me with evidence of my own transactions and I could answer it. I have not now any evidence of those transactions and I didn't keep the books—I keep a mighty good memory I can assure you, but when you want to ask me questions like that, it is not right—I can't answer them. The checks are there and they speak for themselves.

Q. I haven't any of the checks, you are mistaken.

A. Some one has them.

Q. They are in the east, in that Court.

A. I beg your pardon.

Q. If this is the record which is subscribed by you and identified by your signature, and your signature identified and which you admit you swore to—if this record discloses that those payments were made in those respective amounts to those respective people on those respective dates, is it true?

A. Does it make up $245,000?

Q. $245,000.

A. It is probably true—somebody got the $245,000—I didn't, that is sure.

Q. Mr. Rosine, who were the directors of the development company in September, 1906?

A. As far as I can remember, A. A. Housman, Henry C. Davies, George Henderson, Mr. Pierce, whose initials I don't remember for the moment, and myself and McLaren. Now, that McLaren I have explained before, that he was put in, as I remember it, in substitution for French, but I may not be correct in regard to that, but the records will show.

Q. Were there not nine directors of the company?

A. Well, you have reference to those gentlemen out here in Seattle who were inactive, Mr. Trenholme and Williams and Mr. Whitehead—now on that basis, that might be a different classification.

Q. They have been read into the record, I am asking your recollection of them.

A. That is right.

Q. At the time you were elected, were not McLaren, Williams and Trenholme elected at the time you were elected a director?

A. Well, I don't remember, it is probable, but I don't remember that.

Q. So that there would be nine directors subsequent to the date when the board was increased, which was March 21, 1906, which is shown by the record in evidence here that they were increased from five to nine—Rosene, McLaren, Williams and Trenholme were elected to fill the created vacancies, and that made up the board of nine?

A. Yes, sir.

Q. Now when you went back to New York, did you have a board meeting?

A. As a board?

Q. Yes.

A. The record will show that. My impression would be, not.

Q. The record shows there was no such meeting?

A. That was as my impression is.

Q. That is, the record files show no meeting, I mean.

A. Well, I don't believe that meeting was exactly as a board, in September.

Q. And you talked with Housman and Henderson?

A. And Davies.

Q. About this subscription which you were authorized to make, one hundred and twenty-five thousand dollars, did you?

A. Yes.

Q. Did you ever make that subscription?

A. What do you mean, in writing?

Q. In any way.

A. Well, I caused the Northwestern Commercial Company—money and property to be given to the Northwestern Development Company but without the commercial company's knowledge, except my own personal knowledge in each instance, and afterwards, of course, the directors of the Northwestern Commercial Company decided to ratify my acts that had been done unknown to them and unauthoized by them by my making this subscription, which was at my pleading and suggestion.

Q. Then the money which you had applied out of the commercial company to the development company, was applied in each instance by you?

A. Well, either by me or—

Q. By your direction?

A. Yes, by myself or direction.

Q. Without the knowledge of your associates in the commercial company?

A. Except as it came to them within a later period, but at the time they didn't know about it.

Q. And that was applied on this subscription which you made for two hundred and fifty thousand dollars, wasn't it, at that time?

A.. No, that would not be true.

Q. Now, just take the fifty thousand dollars and we will get at it easier. On what was the original fifty thousand dollars applied?

A. To help form the company.

Q. On what account?

A. There was not any account. There had been no subscription made at that time except what you might call a mouth piece; Mr. Housman said that he would take the fifty thousand and I said I would take the fifty thousand and two hundred and fifty thousand for the commercial company, but there was no other subscription when I left New York.

Q. Your commercial company records show that the fifty thousand dollars was paid on the 21st day of April, 1906 and credited to the company, and that was subsequent to the time you subscribed for the stock in the name of the commercial company.

A. Well, Pearl, who was the auditor, would naturally carry tabs in his drawer, and they would not go on the record at the time they were made—they could not go previous to the making, but they could frequently go subsequent to that.

Q. Sort of petty cash tab for fifty thousand dollars?

A. No, I would not call it a petty cash tab. He had nowhere to make the entries. There was a dispute there—he knew that.

Q. You reported fifty thousand dollars paid on the subscription by you in the name of the corporation—you reported that at the April meeting of the trustees of the commercial company, didn't you?

A. I reported that I paid fifty thousand dollars—that was a check right there on the table, so that it was not dodged whatever.

Q. It was paid by check?

A. Yes, fifty thousand dollars, or draft or something to evidence it was there. That twenty thousand dollar check which you referred to was right in evidence at that time.

Q. I am now referring to the first payment which you made on the subscription. You reported, according to the testimony of your associates of this case, you reported that there had been fifty thousand dollars paid on this subscription which you made for the commercial company—you reported that at the April meeting.

A. Yes, for the purpose—

Q. Then in July, on the 15th, you made another credit to the

development company of twenty-five thousand dollars on that subscription?

A. You have the date; I believe that is approximately correct.

Q. So that on the 15th of July there had been applied on the subscription seventy-five thousand dollars?

A. Probably in the way of bookkeeping, yes.

Q. That is what the records show, the commercial company's records?

A. Yes.

Q. Which are in evidence here.

A. Yes.

Q. There was no further payment on that subscription, or application of any funds on account of that subscription, according to the defendant company's books until September 6, 1906, one day after the meeting of the board in September, at which you were authorized to subscribe for one hundred and twenty-five thousand dollars—you remember that, don't you?

A. No, I don't remember. The question is if you want to go by the books, Mr. Gorham, ask the bookkeeper—if you want facts, I will give them to you.

Q. At the meeting, September 5, 1906, when a resolution was adopted authorizing you to subscribe to one hundred and twenty-five thousand dollars of the plaintiff's stock, there had at that time been applied on your original subscription only seventy-five thousand dollars?

A. That is not true. The records may show that but it is incorrect.

Q. When you got to New York it was some two weeks later. that would be about the 20th of September?

A. Well, I got to New York in September and I remained there in October and so on.

Q. When did you see Housman and Henderson and Davies about this matter?

A. That is difficult to say—I don't believe the first day I was there, but within less than a week—I would say within two or three days, but I am not sure about that.

Q. And you reported to them that you had been authorized to subscribe one hundred and twenty-five thousand dollars for the commercial company in the development company's stock, did you?

A. No, I reported to them what had taken place, and it might be in a little different language—that the Northwestern Commercial Company's directors would have nothing to do with the subscription, and Mr. Davies knew it before—that they repudiated it, but the only thing I had been able to do was to get them to take

one hundred and twenty-five thousand dollars, and that because it was forced on them, down their throats, if you please.

Q. Why was it forced on them?

A. I beg your pardon?

Q. Why was it forced on them?

A. Because before I left for Nome I was personal guarantor of approximately half a millon dollars of the Northwestern Development Company's bills. The only communication we had at Nome then was the cable, which was broke nearly all the time, at St. Michaels, and you didn't know when you could get a communication through, and it was not very kind of me to go and leave Mr. Pearl, because he was really to do it. So I told him, whenever the Northwestern Development Company got in a pinch, if they did, and it was almost sure to do it, to apply freight accounts and merchandise accounts, and I said, "I will guarantee anything to carry them along so that they will not get into trouble until the money came from London."

Q. Mr. Trenholme said that all the transactions between those two companies was on a cash basis, and that the freight was invariably prepaid—that is Mr. Trenholme's statement.

MR. BOGLE: Whether it is a correct statement of Mr. Trenholme or not, it is a matter of argument to the jury.

MR. GORHAM: I have the right to put that statement of Mr. Trenholme's to the witness.

A. When I traveled seventy-five thousand miles a year around this world looking after this business, it would be a hard thing to do to keep track of the details of the office. I was dependent upon Trenholme and Pearl to do it.

Q. You did not know anything about the details?

A. No, sir, I took the statements of the office, and I have yet the first time to find any incorrectness in them.

Q. And what you know about this is only what others told you?

A. Know about what?

Q. About these payments?

A. Oh, I made the order—I have seen it here—to Mr. Pearl to do things, and I daresay there are others, if you could find them, and he had the authority from me, but I could not tell it to the board of the Northwestern Commercial Company, because if I told them what I told Pearl, I would have no sooner been on the steamer than they would have nullified it and then "the fat would be in the fire."

Q. On the 25th day of September you were authorized to subscribe one hundred and twenty-five thousand dollars stock on be-

half of the commercial company, of the preferred stock of the development company, that is the resolution.

A. The records put it that way.

Q. The records have it that way?

A. Yes. In other words, the members of the board of the commercial company acquiesced in what I had already done, and expressed it in that form.

Q. They ratified what you had done up to one hundred and twenty-five thousand dollars, on the original subscription?

A. No.

Q. And put it in the present form?

A. No.

Q. Then what did they do?

A. I told you they swallowed what I choked down their throats, and agreed to stand for it.

Q. What is that?

A. They swallowed what I shoved down their throats and what I had forced on them. They never ratified the original subscription, or had anything to do with that beyond the first time.

Q. What is the first time?

A. (Continuing). And then they kicked it out, and pretty near me, too.

Q. You say they kicked it out?

A. They repudiated it, whatever you like.

Q. They did repudiate it, did they?

A. Yes, beyond any question.

Q. When?

A. Three or four days after I got home.

Q. In your presence?

A. Oh, yes.

Q. Now, I will ask you, Mr. Rosine, if you testified at the former hearing, on the former suit on this subscription—

A. What do you mean, in this Court here?

Q. Yes.

A. The records will show—I believe I did.

Q. Don't you know that you did?

A. Well, you had me here, so that you know.

Q. I am not asking you to state that, Mr. Rosine.

A. I believe I did, yes.

Q. And did you testify at that hearing that your commercial company did not repudiate this subscription in April, 1906?

MR. BOGLE: Wait a moment—I object to that as not proper cross examination.

MR. GORHAM: The witness volunteered it.

MR. BOGLE: We did not go into this matter. If he wants to make him his own witness, I have no objection to his going into it.

MR. GORHAM: On cross examination this witness testified voluntarily that they had repudiated this in April—counsel did not ask him about the April meeting, no, but he left the witness to bring it out.

THE COURT: I don't think you have the right to cross examine him on it.

MR. GORHAM: Then I move to strike out what the witness voluntarily stated.

THE COURT: That voluntary statement of the witness may be stricken and it is withdrawn from the jury.

MR. GORHAM: We could not afford to let it stand without going into it.

THE COURT: Proceed.

Q. (MR. GORHAM). Now, I am trying to find out, Mr. Rosene, what you did after the resolution of September 5, by the commercial company, authorizing its president—you were then its president?

A. Yes.

Q. To subscribe one hundred and twenty-five thousand dollars; what did you do?

A. Do where? I was busy every day.

Q. What did you do with respect to the subject matter of that resolution?

A. I have already stated in the direct examination.

Q. State it again.

A. I told Mr. Housman and Mr. Davies—

Q. I am not going to New York yet—what did you do, pursuant to that resolution and the authority delegated to you by that resolution?

A. You mean here?

Q. Anywhere—so far as subscribing is concerned.

A. What was the use of subscribing for something which had already been paid, that would be another tomfoolery.

Q. Then you did not subscribe, is that right?

A. You mean did I sign another written instrument or something?

Q. Yes.

A. I don't know.

Q. You don't?

A. No, sir; that was already paid. They don't come in the same category.

Q. There was only seventy-five thousand dollars of it paid up to that time?

A. I have heard you thresh over those figures. There was a good deal more. I told you we were carrying the Northwestern Development Company for amounts that it can't show in the records—this record could not contain except incidents—the facts are known quite well to me.

Q. That ledger—

A. (Interrupting.) I don't know anything about the ledger. I never saw one of your company's ledgers around.

Q. This is not mine—this is your company's ledger—this is a correct statement from day to day of the accounts between the companies.

A. Let me give you an instance. At one time we lost a ship, the "Tacoma," and there was a cash transaction, as Mr. Trenholme says, to cover the loss, to the amount of thirty thousand dollars. In 1907 Mr. Douglas and all the officers were here, except Mr. Pearl who was in Teller, and were trying to find out what kind of a cash transaction this was. Some thought somebody still owed thirty thousand dollars or something like that, but I could explain it in a minute with Mr. Pearl, because I knew it was only a piece of a bookkeeping transaction—it was perfectly straight and done for a purpose. Now we had to do that with the development company. Money didn't come along, as we had agreed to. We had contracted for a ship ready to go, and if I had put it on the commercial company's books, Mr. Treat would find it out and there would be trouble, or somebody would.

Q. Notwithstanding that, you recognized the entry in October, 1906 balancing this ledger account on the commercial company's books, at which time the commercial company gave the development company a check for over thirty-two thousand dollars?

A. Well, I don't recognize the entries, because I had nothing to do with the entries, and if they gave them the thirty-two thousand dollars, there would be several reasons for it at the time. At that time we were borrowing three hundred thousand dollars from the trust company, for the development company, and if the commercial company had the right to loan to the development company it would sure be demanded—I was not here—I don't know.

MR. GORHAM: We offer in evidence this transcript of the witness' testimony in the case of French versus the development company, the Supreme Judicial Court of the County of Cumberland, State of Maine, given March 8th, 1910, in New York, signed and sworn to by the witness and identified by him as his signature.

MR. BOGLE: We want to look it over.

DE-DIRECT EXAMINATION.

Q. (MR. BOGLE). Mr. Rosene, you were asked if you made certain statements in some deposition for the taking of your testimony in New York, in some other suit—what suit was it you were talking about?

A. Mr. Mathews who had been here came and told me and brought me papers, that Leigh H. French had sued the development company for approximately a million dollars and that was the suit. He had sued them in Maine but the thing would have to be handled in New York.

Q. The testimony that was taken there in New York, was it?

A. Yes—that is, mine was, and that was all of the evidence I believe.

Q. Did you go down there for the purpose of assisting the development company in defending that suit?

A. I did. That was practically the only business I had for three months.

Q. How long did you stay there?

A. Well, I think I was there from some time in January to some time in April.

Q. On this business alone?

A. I had some other business I intended to do, but there was something going on backwards and forwards. They had made several trips to Portland and Mr. Davies went to Europe. I don't remember the exact details.

Q. Who went down with you, did Mr. Davies go down there with you?

A. No, I went alone. He did not go with me. He might have been there when I got there or we may have come shortly after, but I don't remember that one way or the other.

Q. At whose request did you go?

A. Mr. Mathews.

Q. Who is Mr. Mathews?

A. The gentleman who testified here. He was then the president of the development company, or had been a short time before. He was at one time, he was succeeded by Mr. Davis as president of the development company.

Q. You went down there to assist the development company in defending that suit which French brought against them for a million dollars?

A. Yes.

Q. The development company had some lawyers in New York in charge of it?

A. Yes; they had Mr. Feiner—or some of his associates, but Feiner was the particular attorney that was in charge of the development company's affairs.

Q. Was he in conference with you before taking your testimony on those various matters?

A. Oh, yes.

Q. And I think you said they had your checks and notes there, which you gave at the time of this development company organization in New York?

A.. Yes, they had, and probably some other things that they wanted—whatever they wanted that I had I let them have—I loaned them to them.

Q. And you left them there in their possession?

A. For the time being, because they said they would send them to me shortly after, and I asked Mr. Feiner since and he promised he would send them, but I never got them.

Q. So that when you testified down there that you had the checks and the notes and the other things, which gave you the exact data when it came to questions of figures or times of payment?

A. Yes, sir, the amounts. That transaction was five years old and it is ten years now, and I was not sick then, and I am now.

Q. Now you were asked if you did not state at the taking of that deposition that the development company paid two hundred and forty-five thousand dollars in cash and three million seven hundred and fifty thousand dollars of its common stock for this mining property; now if you made any such statement that the common stock was given in addition to the cash for the purchase of this property, were you speaking of the actual, real transaction as it took place between you, or of the bookkeeping or record which was made under the supervision of this Boston lawyer?

A. Well, of course, under the books and records that was made under the Boston lawyer's, because the actual price for the mining claims was two hundred and forty-five thousand dollars, no more and no less. The rest was nonsense.

Q. You were asked if the board of directors did not consist of nine members mentioned, Mr. Trenholme and Mr. Williams and possibly some one else out here in Seattle—I will ask you did Mr. Trenholme ever qualify as a director of the development company?

A. I don't know, but I don't believe he did.

Q. Did he ever attend a meeting, so far as you know?

A. No, he could not, I am sure of it.

Q. Did Mr. Williams ever qualify as a director of that company?

A. Again I don't believe he did, and he didn't attend any meetings.

Q. Neither of them stockholders?

A. Except by this one share business—that didn't amount to anything.

Q. Did they ever actually receive their share, except to receive it and immediately endorsed it and sent it back?

A. I would not know anything about that, you know, since that was done by themselves.

Q. Was there anyone—any director out here of the development company—I mean anyone who ever qualified as a director, except yourself?

A. No, not in the sense that would be a director.

Q. So that when you mentioned the five members of the board there in New York, those five men did constitute the real board—all that had ever qualified on the board?

A. Yes, sir, either five or six, I don't know how many it was. There was Housman and Davis and Henderson and Pierce and McLaren and Rosene—it seems to me that would be six—now, Mr. McLaren was never present at that time—he never was present any time I was there as far as I remember.

Q. You are a little indefinite whether McLaren was a director at that time or not?

A. I was not sure. Mr. Gorham showed me he was, I believe—I am not in a position to say.

Q. But all the directors were present at this conference, with the exception of French and McLaren, if McLaren was a director?

A. You mean in September, after I came to New York in September?

Q. Yes—I don't mean French but at the time you reported that the Northwestern Commercial Company, at your instance, had finally permitted you to take one hundred and twenty-five thousand dollars of that stock, who was it that was present at that time?

A. Housman and Davies and Henderson and myself, though Pierce was in and out and he was aware of those facts.

Q. That constituted the entire board, so far as they had ever qualified, unless McLaren may have been a member of the board at that time?

A. It constituted the working majority of the board and the only ones that did work.

Q. Now you said, Mr. Rosene, that there was no official meeting held. Where did this meeting take place?

A. This conference—you mean this meeting?

Q. Yes.

A. In the office of A. A. Housman & Company, in Mr. Housman's private room facing Broad Street.

Q. Did the board of directors in their meetings in New York meet at Houseman's office?

MR. GORHAM: If this witness knows.

MR. BOGLE: Was that their place of business in New York?

MR. GORHAM: We object to that as calling for a conclusion of the witness; ask him did he ever attend a meeting there.

MR. BOGLE: If he knows whether that is their place of business.

THE COURT: The records would show it, but if he met with them, or what acts he did in connection with them, he may state.

A. The only meetings that I personally attended to was in Mr. Houseman's office, but I believe that at a later period there was some held in Henderson's office, after they began to have rows, but the meetings and all the meetings held prior to my leaving New York in that year in March were held in Houseman's office.

Q. In March?

A. In March, yes. And it is my impression that that would be the official place.

MR. GORHAM: We object to his impression.

THE WITNESS: It is my belief then, or I know it, for that matter.

Q. (Mr. Bogle) I see on the minutes here: "Minutes of a meeting of the directors of the Northwestern Development Company held at 20 Broad Street in New York City on April 19, 1907, at eleven A. M.," was that the office of A. A. Houseman & Company?

A. Yes.

Q. And that is where this meeting or this conference whatever you call it, was held?

A. Yes, the same room.

Q. You carried back there with you the action of the board of trustees of the commercial company that you were authorized to take one hundred and twenty-five thousand dollars of the stock of the development company; the amount that was already turned over or the amount of the indebtedness was one hundred and twenty-five thousand dollars already paid or just being paid for, to be in payment for that one hundred and twenty-five thousand dollars, didn't you?

A. Yes.

Q. Did you state to them that that was the understanding of

the board here, that it was a settlement of any claim to this old subscription which you made in March 1906?

MR. GORHAM: I object to that as leading; let him ask him what transpired.

THE COURT: Perhaps it is a little leading.

MR. BOGLE: It may be a little leading.

Q. What report or statement did you make to those members of the board of the development company at this time in New York with regard to the attitude of the board of trustees of the commercial company in making this one hundred and twenty-five thousand dollar subscription, or authorizing it to be made.

A. I told them, something they knew before, that the commercial campony's directors would absolutely have nothing to do with it; that on the strength largely of Mr. Davis' statement and promise to me in the spring that he would take all that stock from me, not only anything that I took but anything that I had—I had put this thing on the commercial company against the wishes of the directors, and I had, for the reason of the development company's finances, forced it through, and that they would have nothing further to do with it and that was agreeable and there was not any objection raised. It was understood that that was the end of it so far as the transaction was concerned between the two companies.

Q. When you say it was understood—

A. It was agreed.

Q. That is between you and Houseman and Davies and Henderson and Pierce—if he was in and out of this meeting?

A. Well, Pierce understood it if he was not present, he understood it within a short time.

MR. GORHAM: We object to all these conclusions of the witness as to what Pierce understood. He is alive and they can take his deposition.

MR. BOGLE: I did not ask him what he understood—he said Pierce was in and out.

Q. But you say that was agreed between you?

A. Yes. We were all as members of the board, I suppose, of the development company, but we were all stockholders in the commercial company and there was not any question about it. This suit business was the last thought of in the world at that time.

Q. This man Pierce you spoke of, was that the same Pierce that was an employee of Houseman's?

A. That is the only one I knew.

Q. And that was at the office where you were holding that meeting?

A. Well, he was over on the other side of this open board room,

but he would come in every minute and ask Mr. Houseman questions about one thing and another.

Q. Now, Mr. Rosene, it seems from the testimony which has been introduced here, that the stock certificates—that there were certificates for one hundred and twenty-five thousand dollars of the preferred stock of the Northwestern Development Company and an equal amount of common stock that was issued originally by that company to A. A. Houseman & Company and that that was transferred and assigned on the back of it, on the 27th of November 1907—I think that is the date—and sent out to the Northwestern Commercial Company—is that the first time the Northwestern Commercial Company ever received any stock of the development company, November, 1907?

MR. GORHAM: Objected to as not proper re-direct examination. We did not go into the question of this delivery of the stock at all.

THE COURT: It is not re-direct examination but you can recall him if you desire.

(Question repeated to the witness).

MR. GORHAM: We object to that; that question is not predicated upon the facts as disclosed by the record as of date.

THE COURT: He may answer.

(Exception noted for plaintiff).

MR. BOGLE: I am looking for the exhibits—the stock itself was withdrawn and there was a tabulated statement made here—I want to get the correct date.

THE WITNESS: I don't know that I understand your question.

(Former question repeated).

A. I understand the question, but November, 1907 you are talking about. On November 27, 1907, I was at Hot Springs, Arkansas and I would not be aware of anything that took place at that time, and I have not been president of the develpoment company since, and so I can only speak of things that occurred prior to that.

Q. There had been no stock issued by the development company to the commercial company prior to that time, so far as you know, had there?

A. No, it had not so far as I know. There might have been some delivered with the endorsement backward and forward, to Houseman & Company, but I don't remember that.

(Witness excused).

GEORGE J. WILLIAMS called and sworn as a witness for defendant, testified:

That his full name was George J. Williams, resided at Seattle

since 1897, more or less, and was associated with Mr. Rosene in various and sundry enterprises in Alaska.

That he did not recall that he took or received any stock in plaintiff company in March 1906.

That he did not think that he gave any one a proxy to represent him as a stockholder in that company at a meeting held in Portland, Maine, March 29, 1906.

There was not any body in New York authorized to execute a proxy in his name for any stock in the plaintiff company.

That he did not think that he ever qualified as a director of plaintiff company.

That he never acted as a director. That he could not say that he remembered that two shares of stock were sent out from the plaintiff company's office in New York, one running to him and one to Mr. Trenholme, with the request that they be endorsed and sent back there.

Did not remember endorsing the stock and sending it back.

(Witness excused.)

Defendant rested.

PLAINTIFF'S REBUTTAL.

Whereupon, in rebuttal, the plaintiff offered in evidence the deposition of WILLIAM R. RUST, which, with the exhibits thereto attached, were received in evidence and read to the jury, the deposition being as follows:

STATEMENT OF WILLIAM R. RUST.

I was the President of the Northwestern Commercial Company, a corporation of the State of Washington, during the year 1908, including the month of October 1908; that the attached letter, dated Tacoma, May 6, 1908, addressed to Mr. R. L. Cuthbert, signed W. R. Rust, is a true copy of a letter signed by me and mailed to R. L. Cuthbert, representing certain stockholders of preferred stock of the Northwestern Development Company, a corporation of State of Maine, copies of which were by me forwarded to S. W. Eccles, S. Birch, Chas. E. Peabody and D. H. Jarvis on or about the date of said letter;

That on or about October 6th, 1908, at Seattle, Washington, as President of the Northwestern Commercial Company, I received through the U. S. mail or by private delivery, a letter, dated Seattle, October 5, 1908, addressed to the Northwestern Commercial Company, signed E. J. Mathews, President Northwestern Development Company, with two printed enclosures, copies of which said letter of pany, I personally acknowledged the receipt of said letter of October 5, 1908, and enclosures are hereto attached;

That thereafter and during the month of October 1908 at Seattle, Washington, as President of the Northwestern Commercial Com-

pany, I personally acknowledged the receipt of said letter of October 5, 1908, and enclosures, to Mr. E. J. Mathews, President of the Northwestern Development Company, at which time the original capitalization of the latter company including the purchase by it from John Rosene and his associates, of certain mining claims and water rights in Alaska for the sum of $245,000 cash, and the issuance to said Rosene of $3,750,000 in common stock, paid-up, of said Northwestern Development Company, was called to my attention by Mr. Mathews and discussed between us;

And that Mr. Mathews did not, at the time of said conversation, make or waive any claim against the Northwestern Commercial Company on said subscription contract but was seeking to induce it to take a share of a proposed bond issue proportioned according to the preferred stock of said Northwestern Development Company then outstanding.

E. J. MATHEWS, recalled as a witness for plaintiff, testified:

That he was formerly president of the plaintiff from about July 1908 to January 1910.

That he had conversation with Captain Jarvis, the treasurer of defendant during witness' incumbency as president of plaintiff; he talked a great deal with Captain Jarvis after witness was elected president of plaintiff; in fact he got most of his information, and grasp of the company's affairs from Captain Jarvis. A topic of conversation between them was the bonus of $1,250,000 shares of stock issued to the promoters of plaintiff.

Captain Jarvis was treasurer of defendant and witness believed Jarvis did not have the title but was in fact managing director. Jarvis' office was located on the fourth or fifth floor of the Lowman Building and witness' was on the fourth floor—that is the office of the Denny-Renton Clay Company of which witness was president; and when he undertook to accept the position of president of the plaintiff it was at the request of the European stockholders.

He consulted Captain Jarvis in Seattle in Jarvis' office; during the months of say September, October, November and December 1908. He supposed he talked with Captain Jarvis on an average of three times a week, discussing the affairs and relations of the defendant and plaintiff and subsidiary companies of the latter.

The defendant was interested in the plaintiff and had a considerable amount of money and Captain Jarvis was doing what he could in assisting witness in getting a grasp of the plaintiff.

Witness knew nothing about the affairs of the plaintiff at the start.

During those conversations running from October to December 1908, the subject of the bonus stock issued to the promotors of the plaintiff was discussed between them.

He didn't go to the president of the defendant because, Mr.

Jarvis as far as he knew and he was pretty familiar with who was handling the business of the defendant, was the man to see.

He stated awhile ago that Jarvis was performing the duties of managing director, although witness did not know whether Jarvis had that title or not, but that was witness' impression then and it was still his impression, Mr. Rust was president of defendant and lived in Tacoma and would come over two or three times a week and be here a few hours during the day and would go usually back home at night and the next in authority was Captain Jarvis.

(Mr. Jarvis had those conversations with him by what authority) he knew that he was treasurer of the company; he was also a director and so far as witness knew, in the absence of Mr. Rust, was chief in authority.

Mr. Jarvis' statements to witness, during this period of time would disclose and establish the fact that he was in charge of the company's affairs in the absence of Mr. Rust, witness did not recall special instances where his authority was exercised.

He could not say anything more than that next to Mr. Rust, Captain Jarvis was apparently in authority .

(Which last statement was objected to by defendant and defendant moved to strike it out, as incompetent and a conclusion of the witness, which motion was by the court granted, to which ruling of the court the plaintiff excepted and its exception was allowed,

Whereupon the conclusion was stricken.)

What it was that he had observed in the management of the affairs of the company that would indicate that Captain Jarvis was in power was, one instance he recalled, where Captain Jarvis, Mr. Rust and Mr. Thomsen took action in regard to a matter—the relation of the Sesnon Company and the North Coast Lighterage Company—the Sesnon Company being a subsidiary company of the plaintiff and the North Coast Lighterage Company being a subsidiary company of the defendant.

There were three of them taking action.

What was done that would indicate authority was: Captain Jarvis, Mr. Rust and Mr. Thomsen signed his note for $12,500 to enable the purchase of certain of the Sesnon Company, which was a subsidiary of the plaintiff. The defendant desired the control of the Sesnon Company should reside in the plaintiff because they had an interest in the plaintiff and Captain Jarvis was the man who suggested this arrangement—and it was carried out.

Not all for the interest of the defendant, his interest was not in defendant; so far as the other three were concerned, their interest lay with the defendant. They signed that note individually.

(Whereupon upon motion of defendant that statement of

witness was stricken, to which ruling of the court the plaintiff excepted and its exception was allowed;)

That all the business he did, practically all with defendant was through the treasurer.

He had not had the affairs of this company on his mind for several years and did not recall particular instances, where any of that business was carried out, completed and consummated, further than that the defendant was interested in the success of the plaintiff; they had a considerable amount of money in it and Captain Jarvis and Mr. Rust and others were doing what they could within certain limits to assist the plaintiff.

That he thought, in October 1908, possibly in September also, he discussed with Mr. Rust, the president, the matter of commissions or profits to the promoters of the plaintiff. They discussed the question of the issuance of $3,750,000 par value of the stock of planitiff to John Rosene, and Mr. Rust stated that of that amount, $2,500,000 par value was set aside to be given as a bonus to the subscribers for the preferred shares and the other million and a quarter was a personal profit to Mr. Rosene and his associates.

Cross Examination.

That was in September or October 1908; after this $125,000 of stock had been issued to defendant.

(Witness excused.)

Whereupon plaintiff offered in evidence defendant's Exhibit No. 3 for the purpose of showing the statement which Mr. Hartman was authorizing as attorney for the defendant to be sent to the secretary of plaintiff. Same was received in evidence.

Whereupon all the parties rested and the testimony was closed and the court proceeded to instruct the jury as follows:

INSTRUCTIONS BY THE COURT TO THE JURY:

Gentlemen of the Jury, you have been selected to try the issues in this case, and have been accepted by the attorneys on both sides because they believe in your fairness and believe that you are unprejudiced and your minds open to consider and fairly weigh all of the evidence which has been offered and admitted in this case. You will approach the issue which is presented here for your determination with that spirit and feeling and consciousness of fairness that if your positions were reversed and you were changed to the position of either of the litigants in this case you would feel that your cause would receive fair consideration. You have a duty and a function to perform in this trial which stands alone and in which you must act alone. You are the sole judges of the facts that have been disclosed upon the trial of this case and upon which the issue which is to be determined must be concluded. The Presiding Judge cannot be of any assistance to you in determining what the facts are. That is your

sole province. The attorneys for the respective parties to this litigation have a special duty and function to perform, and that is, each party presents the facts as they understand them and bearing upon the issue from their view-point, to you. It is your duty to take the facts as presented upon both sides and determine what the real fact is; what the truth is with the relation to the issue here, and report to the court. The Presiding Judge will give you the law which is applicable to those facts, and you are to be governed and guided by the law which I will give you as the Presiding Judge upon this trial, in arriving at the conclusion as to what the facts are in so far as they have relation to the law. You are likewise the sole judges of the credibility of the witnesses who have testified before you, and in determining the weight or the credit that you desire to attach to the testimony of any witness you will take into consideration the demeanor of the witness upon the witness stand, the reasonableness of the stories of the several witnesses who have testified before you; the opportunity of the witnesses for knowing the things about which they have testified; the interest or lack of interest of the several witnesses in the result of this controversy, and surround the witness with all of the circumstances as disclosed by the evidence, and place him in that environment and then see the credence that should be given to this testimony and the weight which his evidence commands, and then place the weight where you believe it ought to be. One witness testifying to a fact or state of facts may outweigh many witnesses. It is not the number of witnesses testifying to any fact, but the quality of the testimony which has weight and which carries the conviction of truth, and that is the criterion upon which you must consider this evidence.

The issue in this case to be determined by you is made by the pleadings which have been filed. These pleadings may be taken with you to the jury room, and may be read by you, and you can determine just what is claimed upon the one side and what is claimed upon the other side, and you will consider that where one party makes a contention and that is admitted in the pleadings, no proof need be offered as to that, because that is taken as confessed; but where a statement is denied upon the other side, then the burden of proof is upon the party who makes the allegation; that is, he must then prove to your satisfaction by a fair preponderance of the evidence that his contention is true. You will find in these pleadings a statement made on one side that it has no knowledge or information sufficient to form a belief with relation to a particular allegation. Under the rules of pleading that is to be taken as a denial, and where such a statement is made in the answer or in the reply, you will require proof of the allegations by a fair preponderance of the evidence. You will likewise consider that if any admission is made upon the trial with relation to the existence of any fact that no proof need be offered of that fact. These pleadngs, while you may take

them to the jury room and read them and determine just what is admitted upon one side and denied and the issue which is really offered upon which you must consider evidence, they are not to be considered as evidence in any sense, and you can only determine the facts in this case from the testimony which has been offered and admitted and by the admissions which appear in the pleadings or which are made upon the trial.

In determining and weighing the evidence, you will take into consideration all of the exhibits offered and admitted and consider them for the purpose for which they were designed to be used. I do not think that any of the exhibits have been limited to any particular facts. You can consider them for what they are worth to establish the facts in this case.

The evidence, I think I might say to you, is of two characters, and should be so considered. Direct and positive testimony is evidence of witnesses who know the persons, or said things with relation to the particular matter, or heard what someone else said, or saw what was done; and likewise the exhibits, the papers, documents and writings offered in evidence here which show that certain particular things were done or statements made—these are to be considered in the light of positive or direct testimony. Then there is what is called circumstantial evidence, that is, proof of such facts and circumstances surrounding the conduct of the parties whose relations or conduct may be under investigation which so fit in and dove-tail into the condition and surroundings tending to establish a particular fact as to leave no question as to the condition or relation established by such facts.

Such evidence should be given the weight and consideration to which it is entitled, and sometimes circumstances are more convincing than direct testimony, and it is for you as jurors in this case to eliminate from your minds every other fact which has bearng upon this case save and except the evidence which has been offered and admitted; that is, the testimony of the witnesses and these documents that have been admitted as exhibits, and in that narrow channel, to determine what the facts are in this case.

I think I should also say that when you retire to the jury room that you perhaps will have twelve different view-points upon every issue in this case. You can't come to any conclusion as to the issues in this case by sontinuing to have twelve different view-points; nor should any juror stand out arbitrarily and simply close his mind to any reason or suggestion on the part of the other members of the jury. But it is your duty as jurors to reason together and take into consideration all of the evidence which has been offered and admitted, compare the various lines of testimony of the several witnesses and eliminate what you believe should not be considered and what should not be given credence or which is not entitled to the weight

which other testimony should receive, and when you have analyzed all of the testimony in that way, assimilate that which you believe to be true and which should be given weight and credence, and then determine what your conclusion should be as to the facts in this case. It will require your entire number to agree upon a verdict in this case.

You are to conclude in this case upon the testimony offered and admitted. If I should make any reference to any testimony or convey to you any opinion which I may have of any fact in this case, I want you to disregard that entirely, because it is not my purpose to convey to you any idea I may have with relation to any fact in this case. And in your consideration of the evidence you should take into consideration the argument made by counsel on both sides. They have reviewed the evidence from their view-point. While their views are not controlling, yet their argument should be considered with relation to the evidence as to whether they have correctly stated the evidence to you, and you will simply consider the testimony as you remember it, and conclude from the evidence you have received from the witnesses and from these documents, and if there is any difference between the testimony as quoted to you by counsel on either side and your recollection of the evidence given by the witnesses or these documents which have been admitted as exhibits, you of course will be controlled by the evidence which has been offered and admitted as you remember it.

In this case the issues have been very fully stated to you by counsel. I will not go into a minute statement of the issues in this case. If you desire you may read the pleadings and determine just what is admitted and what is denied. The issue really is not very complicated, although much evidence has been received to establish the necessary facts, some of which has no direct bearing upon the issue, but it is helpful to explain the relation and conduct of the several parties who are interested in this controversy as officers or stockholders in the one or the other of the parties to this litigation, and likewise with relation to the witnesses who have testified before you, which assists you in weighing the testimony and considering the credibility of the witnesses. Several necessary facts are either admitted or are established beyond any controversy. It is established beyond any question that the plaintiff is a corporation, organized under the laws of the State of Maine and that it was incorporated for the purposes set out in the complaint, that the total capital stock of the plaintiff was and is $6,250,000.00 par value, and by its certificate of incorporation the plaintiff undertook to divide its stock into two classes, viz., one class is known as preferred stock and is divided into 500,000 shares at a par value of $5.00 per share. Of this stock 499,989 shares was placed in the name of A. A. Houseman & Co. to be issued at the rate of one share of common stock to the subscriber of one share of preferred stock. The remaining common stock was is-

sued to the several promoters to the amount of 1,250,000 shares. It is admitted that the defendant is a corporation organized under the laws of Washington. It is also established that John Rosine at the time of the organization of the plaintiff was one of its promoters and was President of the defendant company, and at the time was in the City of New York where the promoters met, and at the time charged in the complaint signed the agreement for stock set out in the complaint for $250,000 in stock in the planitiff company, and caused to be paid to the plaintiff company, $50,000. It is also established that at the time he had no authority from the Board of Directors of the defendant company to make the stock subscription. It is also established that the assessment was made for the unpaid subscription on the preferred stock in the manner provided by law and notice of such assessment given to the defendant.

Briefly, it is contended by the plaintiff that the stock subscription by Rosine for the defendant was fully ratified and that it has paid upon the subscription $50,000 and other payments to the amount of $125,000 and there is still due $125,000 with interest from date of the assessment, March 12, 1912; while the defendant contends that the subscription was never authorized, nor was it ratified; that the plaintiff could not issue common stock as a bonus as the subscription of stock of a corporation is a securtiy for all creditors of the corporation, and the stock could not be issued to the defendant without paying for the same, and that if the stock was issued, the defendant would be liable to the creditors for the par value thereof, and that the tender of such stock would not relieve the defendant of liability on the basis of unpaid stock, which is the agreement set out in the subscription of the plaintiff. It further contends that immediately upon it obtaining knowledge that Rosine had subscribed for 250,000 shares of stock in the plaintiff company, a meeting of the Board of Trustees was called in April, 1906, and the subscription disaffirmed, and notice of such action given to the officers of the plaintiff company, and further contends that in September, 1906, it learned that Rosine had applied $125,000 of the funds of the defendant to the plaintiff as payment of stock subscription, and that on September 5, 1906, the Board of Trustees of the defendant authorized a subscription of $125,000 and no more, and no other or further subscription was ever recognized. It is also contended by the defendant that the plaintiff was promoted by French, Rosine, Henderson and Houseman, and their associates, under the laws of Maine, which provide, in substance, that all of the capital stock of a corporation must be paid for before the corporation can do business, and that the mining claims that they secured were obtained for $245,000 cash and were turned over to the company for $245,000 in cash, and all of the common stock, as already stated,and that 1,250,000 shares of the common stock was issued to these parties as a bonus, and 2,500,000 issued to Houseman for delivery to subscribers of preferred stock, and that

the stock held by Houseman has not been issued as payment for property, and that the property was in effect not worth more than $245,000, and that the parties had no knowledge of the value and did not make any bona fide effort to obtain a proper valuation of this property, as provided by the laws of Maine. In this connection, you are instructed that under the laws of the State of Maine, a corporation, which would be the plaintiff in this case, had a right to purchase mining property necessary for its business and issue stock to the amount of the value thereof in payment, and the stock so issued shall be fully paid and not liable to any further calls, and in the absence of actual fraud in the transaction the judgment of the directors as to the value shall be conclusive. In considering this particular provision of the statute, it will be necessary for you to consider what actual fraud would be. Actual fraud may be defined as an intentional imposition upon another to his damage. In actual fraud there must appear the following elements: (1) A material representation; (2) That the representation was false; (3) That it was known to be false, or made recklessly without knowledge of its truth, and as a positive assertion; (4) That it was made with the intention that it should be acted upon; (5) That it was relied upon, and (6) That damage was suffered thereby. In considering these phases of the issue in this case you will take this definition of actual fraud into consideration in applying this to the conduct of the parties at the time of the issuance of this stock and the securing of these mining claims, and determine whether they did come within this definition of fraud, and if you find that they did, and that these claims were obtained and this stock was issued without the Board of Directors having any knowledge as to the value, and that the values were recklessly placed upon the claims, of course you could rightfully conclude that they had not complied with this provision of the statute in its organization. Each of these elements must be proven with a reasonable degree of certainty and all must be found to exist. In the case of actual fraud it is different than in the case of implied fraud, and in considering this you will take into consideration the definition which I have given you. If fraud was committed by the promoters of the plaintiff in the valuation of the mining claims and contrary to the provisions of the Maine law that I have just stated to you, then the plaintiff would not be in a position to give a share of the common stock as set out in the subscription agreement, because, as I have already stated, the plaintiff corporation could not legally issue to the defendant corporation or to other subscribers common stock or other stock for which no money had been paid or obligations made and which represents no return to the plaintiff corporation in property or services and labor equal to the par value of the stock, or so estimated, in the absence of actual fraud, by the Board of Directors. And if you find this to be a fact, then of course the

laintiff company, as I have already intimated to you, could not omply with the agreement which is set out in its complaint with elation to the transferring of one share of common stock with ach share of preferred stock that has been subscribed. In this onnection, I should further instruct you that the plaintiff, in its eply, has stated that these facts all came to the knowledge of the efendant more than three years prior to the commencement of this ction, and that the defendant had knowledge of all of these facts, iat is, fraudulent acts, if any were committed by the defendant, nd did not take any steps to disaffirm or disavow the contract. n this connection, you are instructed that if the defendant had nowledge of the fraudulent transaction, if you find that the tran- action was fraudulent, and that the trustees were guily of actual raud as set out in the Maine law, and that the defendant, through s officers, had knowledge of these acts more than three years rior to the commencement of this action, which was March 29, 912, and took no action to disavow the contract or to be relieved rom the contract by bringing an action to have it set aside, then f course it could not raise that at this time.

You are further instructed that where an unauthorized sub- cription is made by an officer of a corporation; that is, where n officer of a corporation, as Rosine did for the defendant in this ase, makes a subscription of capital stock which is not authorized, he company or corporation is not bound by that subscription, ntil, through its proper officers, it has affirmed the subscription. he act of affirmance may be made in several ways. It must be nade, under the laws that govern the issue here, by the Board of rustees, either actually or by such conduct as leaves no other easonable inference but that it was affirmed. This may be done n several ways. It may be done by passing a formal resolution nd making such act the act of the Board, or by such conduct with elation to the subscription as would estop the corporation from declaring otherwise, as when payments are made by the corpora- ion on the subscription agreement, after report to the Board of uch act, and the treatment of the act as the act of the Board of rustees. In determining the question of affirmance, you will veigh all of the evidence which has been offered and admitted; aking into consideration what the Board of Trustees of the de- endant company actually did, if anything, or what it did not do. vhen you believe that reasonably prudent conduct would have equired them to do something as disclosed by the evidence in this ase; and determine from all of the evidence which has been of- ered and admitted with relation ta the conduct of the Board of rustees towards this act of Rosine, or its officer, in mak- ng this subscription as to whether is was affirmed, and if you be- ieve that it did by its active or passive conduct actually affirm he subscription, and that no other reasonable conclusion can be

reached from this conduct, then it will be an affirmance. On the other hand, if you believe from the evidence that upon learning that the subscription had been made, a special meeting of the Board of Trustees was called, and the subscription considered, and disapproved by the Board either by passing a resolution orally or in writing, or by such concurrent expression of sentiment and voice by the individual trustees assembled as a Board, which all believed was an act of disapproval by the directors as a Board, such would be an act of disaffirmance, whether a resolution was actually passed or not, provided action was taken by the trustees as a Board and was so considered by the trustees. In this connection you are instructed, however, that the mere expression of individual opinion by the individual trustees, without any concurrent action, would not be considered as the action of the Board, if it was not understood by the board to be an action on the part of the Board. You are also instructed in this connection, that it would not be necessary for the Board to put its action upon the minutes. If the Board of Trustees met and did an act with relation to this subscription, either in affirmance or disaffirmance, it was not necessary in order to bind the defendant company, to put that act upon the minutes. If it was done, that is sufficient, provided notice of this action on the part of the Board was given to the officers of the defendant company or some officer who was entitled to receive such notice, and you are instructed that a member of the Board of Directors of the defendant company would be a proper person to be so advised. The notice need not be in writing. It may be made in writing—

MR. BOGLE: Your Honor used the words "defendant company," when you meant "plaintiff."

THE COURT: Give notice to the plaintiff corporation—if I used the word "defendant" I meant "plaintiff."

Now, the notice need not be in writing. It may be made in writing or may be oral, and either would be effective, but it must be established to your satisfaction with the same preponderance as any other fact in the case that notice was actually given. And you are instructed that if disaffirmance was made and notice of such fact was given to the plaintiff company or some of its officers, the act of disaffirmance would then be complete. You are further instructed that if you should find that after the meeting in April, 1906, further payments were made by Rosine, or through his direction, or by the defendant through other officers, and that on September 5, 1906, at a meeting of the Board of Trustees, subscription to the amount of $125,000 was authorized, then the plaintiff cannot recover in this case, if you find that the directors at a meeting in April, 1906, had disaffirmed the subscription. But if you should find that the directors in April, 1906, did not disaffirm the subscription, but that the action on the part of the

Board was continued and the defendant company continued to pay further sums upon the subscription, and then in September, 1906, passed a resolution authorizing subscription to the amount of $125,000, and you believe from the evidence in this case that the defendant by its conduct prior to the 5th day of September, 1906, had ratified and affirmed the subscription, then the plaintiff would be entitled to recover, as defendant would not be permitted to affirm a subscription and then disaffirm one-half of it, unless you should find from the evidence in this case that the charge of fraud in the organization of the company as to the valuation of the property that was transferred to the plaintiff company has been sustained as heretofore referred to in these instructions, and that the defendant company did not have notice of such actual fraud on the part of the directors in the valuation of the property for more than three years or three years prior to the 29th day of March, 1912, and took no action to disaffirm it.

In this case I will not attempt to analyze the testimony and to take up the several parts of the evidence and apply it to the other parts and then apply that to the law as given to you for your direction, because the evidence has been very fully analyzed by counsel upon both sides, and I have given you the law now which is to govern you in your deliberations in this case. You will weigh all of this evidence, and when you have agreed upon the facts in this case, you will indicate that by the verdict which you will return. You can return one of two verdicts. The plaintiff is either entitled to recover for the entire sum sued for or it is entitled to recover nothing. If you find for the plaintiff, then this will be your form of verdict:

"We, the jury in the above entitled cause, find for the plaintiff in the sum of $152,895.80, being the sum of $125,000, with legal interest from March 12, 1912, to date."

I had the Clerk make the computation and include the total sum. If you find for the defendant, this will be your form of verdict:

"We, the jury in the above entitled cause, find for the defendant."

Whichever verdict you find, you will cause to be signed by your foreman, whom you will elect immediately upon retiring to the jury room.

Have I covered the entire case, or are there any omissions or exceptions?

MR. GORHAM: I would ask the Court to instruct the jury with reference to the ratification of the issuance of the stock by the defendant through the Housman proxy, January 23, 1907, that is part of the pleadings and part of the proof.

MR. BOGLE: I don't think that that is competent here, be-

cause there is not a particle of evidence that this defendant was represented at that meeting. As a matter of fact, it is admitted, as shown by their own record, that the defendant was not a stockholder of record.

THE COURT: I don't care for any argument. Are there any other omissions?

MR. BOGLE: I think your Honor in instructing in regard to the fraud in the valuation of the mining property, failed to instruct the jury that if they found that there was a fraud that they would return a verdict in favor of the defendant. You defined a fraud, but you did not specifically instruct them what would be the effect if they found there was a fraud under your definition. I assume that would be understood by the jury, but I want to call your attention to it.

MR. GORHAM: I think, if the Court please, I understood you to say that all the capital stock of the plaintiff company must be paid before, under the laws of Maine, it could not do business.

THE COURT: That was a mis-statement, yes.

MR. GORHAM: —not to entitle it to do business—doing business is not an issue here and I don't think your Honor meant to give that instruction. I would like to have the Court withdraw the instruction then, because it is not the law under the state of Maine.

THE COURT: Yes. That part of the instruction where I said that all of the capital stock must be paid before it can do business—that is withdrawn; but what I mean to say—the Maine law requires capital stock to be paid, and which means paid in the way of either cash or in the way I indicated in the instruction.

MR. GORHAM: Did your Honor mean to instruct the jury that it should be paid in full, that the law of Maine requires it to be paid in full?

THE COURT: As calls are made by the directors or the proper officers of the company.

It has been suggested by counsel for the plaintiff that you be further instructed with relation to the plaintiff's contention upon the stock deposited with Housman & Company.

You are instructed that the stock that was deposited with Housman & Company, if you should find that no fraud was committed, and that the board of trustees did value the property in the way indicated in these instructions, and that no actual fraud was committed, and that this stock was in fact issued to Rosine or his order in payment for the property, then Housman would have that stock, not as purely a bonus stock, but a stock which could be, under the Maine law, considered paid in full and for which no further demands could be made.

Counsel for defendant has asked that I instruct you a little further with relation to your conduct should you find—as to what your verdict should be should you find that actual fraud was committed and that the common stock which was deposited with Housman & Company was still subject to further assessment.

I will instruct you in this connection that if you should find that actual fraud was committed, as outlined in the instruction, and the defendant company did not have notice of that for three years prior to March 29, 1912, then you should find for the defendant in this case. But if you find that fraud was committed, and find the defendant knew of that for three years at least prior to March 29, 1912, then you would have to further find upon the other phase of the law and facts, that is the law that I have given you and the facts as disclosed by the witnesses, as to whether the stock subscription was ratified or not, and your verdict then should be as you find, either for the plaintiff or for the defendant.

MR. GORHAM: I desire to request the Court to give instruction number 16 as filed by the plaintiff.

MR. BOGLE: I suppose your Honor will note exceptions taken after the jury retires.

THE COURT: I would like to note the exceptions, but the circuit court of appeals dismissed an appeal filed some time ago because the exceptions were not taken in the presence of the jury. That is why I made the suggestion to take the exceptions now.

The plaintiff requests me to give this instruction. This is in substance what I have stated to you, but I will read it.

The plaintiff had the legal right to issue all of its common stock to John Rosine in part consideration of the conveyance by Rosine to it of certain mining properties and water rights, provided that all of its then stock subscribers concurred therein. And if you find that all of plaintiff's common stock was issued to John Rosine for such properties, with the concurrence of all its then stock subscribers, and all of the holders of its capital stock then outstanding—I will just modify that—provided they acted in good faith in the matter and were not guilty of actual fraud in the transactions as I have already instructed you, then such issue was legal. legal.

MR. GORHAM: We desire now to note an exception, if the Court please, for the failure to give particularly instruction number 16 as among the requests of the plaintiff.

MR. BOGLE: If the Court please, we except to that portion of the instructions given by your Honor to the effect in substance that if the jury finds that this stock that was issued, deposited with Housman & Company, was issued fraudulently without any consideration having been received by the corporation for it, that

is not a defense in this case if the defendant had knowledge of the fact three years or more before the institution of this action.

We except to that part of the instruction which finds what constitutes fraud in that connection, for the reason that it omits to instruct the jury that if the valuation was made by a board of directors of the plaintiff company who, by a combination prior to that, were interested in this identical stock and who had agreed to divide this stock among themselves in a bonus, but to put a valuation on the property in their resolution so that it would appear that the company was getting payment for it, that that is of itself a fraud within the definition your Honor has given. It is applicable to the facts here, because it was French and Housman and Davies and Henderson, representing Rosine, were the men who made that valuation.

THE COURT: Yes. I have your idea.

MR. BOGLE: Now, I take it, you have somewhat modified instruction number 1 as requested by the defendant.

THE COURT: Yes.

MR. BOGLE: We will note an exception to the failure to give it in the form requested and to the modification which your Honor made. Did your Honor embody instruction number 2 in your general charge—I could not follow it.

THE COURT: I gave a portion of number 2.

MR. BOGLE: I think you gave number 3 substantially as requested, so far as I could gather. I will note an exception to the failure to give defendant's instruction number 2 as requested in the form requested, and to the modification made by the Court.

THE COURT: All right. With relation to the exception to the instruction upon the definition of fraud, the jurors were instructed to take into consideration all of the circumstances surrounding the conduct and acts concerning which testimony was given, and I think it is fully covered. That is all. You may swear the bailiffs.

(Whereupon the bailiff was sworn to take charge of the jury.)

THE COURT: Let the jurors take their places in the jury box again.

I forgot—I omitted to suggest to you that the further and third affirmative defense in the answer has been stricken from the answer and is not to be considered by you. I just drew a line across it, and you will omit that in reading these pleadings.

MR. BOGLE: May I have just one more exception to the instructions?

I want to note an exception to that portion of your Honor's instructions which tells the jury to examine the pleadings, con-

sisting of the complaint and answer and the reply, and determine the issues they are to try from the pleadings.

(Whereupon the jury retired to deliberate upon their verdict and counsel agree as to what exhibits are to go to the jury.)

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2117.

Maine Northwestern Development Company, a corporation, Appellant.

vs.

Northwestern Commercial Company, a corporation, Appellee.

Certificate of Judge.

The foregoing is a true, complete and properly prepared statement of all of the testimony introduced upon the trial of the above entitled cause in the United States District Court, for the Western District of Washington, Northern Division, essential to the decision of the questions presented by the appeal of said cause heretofore herein petitioned for and allowed by said District Court, together with all objections and exceptions made and taken to the admission or exclusion of evidence, and all motions and rulings thereon made upon said trial, and together with the Instructions of the Court to the Jury upon said trial and the exceptions taken by the plaintiff to the refusal of the court to give to the jury Instruction No. 16, as requested by the plaintiff, which exception was taken at the close of the court's instruction to the jury and in the presence of the jury and before it retired; and which testimony, together with the original exhibits offered and admitted upon the trial of said cause, and consisting of Plaintiff's Exhibits:

D1, D2, D3, D4, D5, D6, D7, D8, D9, D10, D11, D12, D13, D14, D15, D16, D17, D18.

E1, E2, E3, E5, E11, E12, E13, E14, E15, E16, E17, E21.

F, F1, F2.

G, H, I, J, K, K1, L, M, N, N1, N2, S1, S1½, S2, S3, T1, T3, T4, T5.

AA, BB, CC, DD, EE, FF, GG, HH.

Stipulation of parties, in re statement of W. R. Rust, dated July 2, 1915, filed July 15, 1915.

Exhibit (defendant's) marked for identification No. 3, stipulation of parties, in re amendment of pleadings, dated May 11, 1914, filed May 12, 1914, offered by plaintiff and excluded by the Court on the objection of defendant.

Defendant's Exhibits:

Nos. 1, 2, 4, 5, 6.

No. 3 for Identification, offered by defendant, objected

to by plaintiff, ruling reserved by Court on objection; offered by plaintiff and received in evidence,

constitute all of the evidence introduced upon said trial essential to the decision of the questions presented by said appeal, and the same is hereby approved.

So much of said testimony as is reproduced in said statement in the exact words of the witness is so reproduced at the special instance and desire of the above named appellant, and the court hereby directs such reproduction.

Dated Seattle, Washington, this 20th day of March, 1916.

JEREMIAH NETERER,

United States District Judge of the United States District Court, for the Western District of Washington, Northern Division, presiding at the trial of said cause.

Indorsed: Statement of Evidence. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 20, 1916. Frank L. Crosby, Clerk.

United States District Court, Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

Instruction No. 16 Requested by the Plaintiff.

The plaintiff had the legal right to issue all of its common stock to John Rosene in part consideration of the conveyance by Rosene to it of certain mining properties and water rights,provided that all of its then stock subscribers and all of the holders of its capital stock then outstanding concurred therein; and if you find that all of Plaintiff's common stock was issued to John Rosine for such properties, with the concurrence of all its then stock subscribers and all of the holders of its capital stock then outstanding, then I instruct you that such issue was legal; and if you further find that all of the four hundred and ninety-nine thousand nine hundred and eighty-nine (499,989) shares thereof alleged by Plaintiff and admitted by the Defendant as issued to A. A. Housman & Co. for the benefit of the subscribers to the preferred stock of Plaintiff, there was thereafter by said A. A. Housman & Co. assigned to and is now held by Plaintiff sufficient for Plaintiff to issue and deliver to Defendant one share thereof for each five dollars ($5.00) paid on Defendant's subscription; then I further instruct you that such issue and delivery by Plaintiff to Defendant would be in performance of Defendant's subscription. And I further instruct you that the validity of the issue of Plaintiff's common stock in part

consideration for the conveyance by Rosene of said mining properties to the Plaintiff would not be in the least affected by the fact that Rosine was making a commission as promoter if that fact was known to all directors of Plaintiff and to all of its then stock subscribers and all of the holders of its stock then outstanding and there was no objection made by any of them thereto.

Indorsed: Instruction No. 16 requested by the Plaintiff. (Excerpt from Plaintiff's request for instructions.) Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 1, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

Verdict.

We, the jury in the above entitled cause, find for the Defendant. Geo. H. Mead, Foreman.

Indorsed: Verdict. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 1, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

Judgment.

The above entitled action having come on regularly for trial, on Tuesday, November 23, 1915, William H. Gorham, Esquire, appearing as attorney for the plaintiff, and Messrs. Bogle, Graves, Merritt & Bogle, appearing as attorneys for the defendant, and a jury having been duly and regularly impaneled and sworn to try said action, evidence was introduced by each of the respective parties, said cause being continued from day to day until Wednesday, December 1, 1915, whereupon, after hearing all of the evidence, the arguments of counsel for plaintiff as well as for defendant, and the instructions of the Court, the jury retired to consider their verdict, and subsequently on December 1, 1915, returned into open Court and in the presence of the parties hereto, returned the following verdict, to-wit:

"We, the jury in the above entitled cause, find for the defendant,"

which said verdict was duly filed and entered of record;

Now, on this day, the defendant, by its attorneys of record, appearing and moving the Court for judgment upon the verdict of the jury as heretofore entered in said cause, plaintiff being in open Court,

It is ORDERED, ADJUDGED and DECREED by the Court that the plaintiff, Maine Northwestern Development Company, take nothing by this action, and that the defendant, Northwestern Commercial Company, go hence without day and recover from the plaintiff its costs herein taxed at the sum of..... Dollars ($.....).

ORDERED and ADJUDGED in Open Court this 2nd day of December, A. D., 1915.

JEREMIAH NETERER, Judge.

O. K. as to form. W. H. G., Atty for Pltf.

Service of within Judgment this 2nd day of December, 1915, and receipt of a copy thereof, admitted.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsement: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 2, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

Petition for Appeal and Order.

To the Honorable Jeremiah Neterer, United States District Judge, for the Western District of Washington, Northern Division:

The above named plaintiff, conceiving itself aggrieved by the judgment made and entered on the second day of December, 1915, in the above entitled cause, does hereby appeal from said judgment to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and it prays that its appeal may be allowed and that citation issue as provided by law, and that a transcript of record, proceedings and papers upon which said judgment was based, duly authenticated, may be sent to the United

States Circuit Court of Appeals, for the Ninth Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made.

Dated Seattle, Washington, March 7, 1916.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

The foregoining petition is granted and appeal is allowed upon giving bond conditioned as required by law in the sum of $500.00.

Dated Seattle, Washington, March 7, 1916.

JEREMIAH NETERER,

District Judge, United States District Court, Western District of Washington, Northern Division.

Indorsed: Petition for Appeal and Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

Assignment of Errors.

Now on this 7th day of March, 1916, comes the above named plaintiff, by its attorney, William H. Gorham, and says that the judgment in said cause is erroneous and against the just rights of said plaintiff, for the following reasons:

First: Because the court erred in sustaining the objection of the defendant to the introduction in evidence by plaintiff of plaintiff's exhibits marked E-4, E-5, E-6, E-7, E-8, E-9 and E-10, to which ruling the plaintiff excepted and its exception was allowed by the court;

Second: Because the court erred in sustaining the objection of defendant to the introduction in evidence by plaintiff of a stipulation between the parties to said cause of date May 11, 1914, filed in the above entitled cause May 12, 1914, stipulating for the amendment of the pleadings, to which ruling plaintiff excepted and its exception was allowed by the court;

Third: Because the court erred in sustaining the objection of defendant to the introduction in evidence by plaintiff of the minutes of the meeting of the Executive Committee of defendant of date October 23, 1907, including a resolution as follows:

"BE IT RESOLVED: That Mr. Eecles be requested to call a meeting of the trustees at a very early date, for the purpose of asking for the resignation of President Rosene, or accepting the resignation of the balance of this committee,"

to which ruling plaintiff excepted and its exception was allowed by the court;

Fourth: Because the court overruled the objection of plaintiff to the following question put by defendant to its own witness, H. W. Treat, on direct examination, to-wit:

Q. Then I will ask you this question, Mr. Treat. Did the Board of Trustees of the Northwestern Commercial Company, the defendant, at any meeting attended by you, authorize Mr. Rosene to subscribe for stock in the Northwestern Development Company, the plaintiff here, prior to the Board meeting of September 5, 1906?

to which the witness answered: "No, sir," to which ruling the plaintiff excepted and its exception was allowed by the court;

Fifth: Because the court overruled the objection of plaintiff to the following question put by defendant to its own witness, H. W. Treat, on direct examination, to-wit:

Q. State what took place before the Board at the time when those resolutions were adopted,

to which the witness answered:

A. We had a general discussion and looked into the accounts of both companies and found that the Northwestern Development Company owed the Northwestern Commercial Company such an amount for freight and supplies that if we were to settle upon a $125,000 sum it would merely square the account and make it satisfactory to both companies and start over again, as it were. So the transfers were made. There had been some transfers made in the books without coming up again as I don't think there was any cash paid for any of this stock. I think it was merely a question of bookkeepers' transfers and journal entries,

to which ruling plaintiff excepted and its exception was allowed by the court;

Sixth: Because the court overruled the objection of the plaintiff to the following question put by defendant to its own witness, J. D. Trenholme, on direct examination, to-wit:

Q. Did the Board of Trustees of defendant, Commercial Company, at any time ratify any subscription made by Mr. Rosene to the capital stock of the Development Company outside of the subscription authorized at that meeting of September 5, 1906?

to which the witness answered: "They did not," which ruling plaintiff excepted and its exception was allowed by the court;

Seventh: Because the court overruled the objection of plaintiff to the following question put by defendant to its own witness, J. D. Trenholme, on direct examination, to-wit:

> Q. Did you notify him, or had he been notified, so far as you could tell from your conversation with him, of this action of the Board of Trustees of the defendant company?

to which the witness answered:

> A. I met Mr. Davies at the entrance of the Butler Hotel and we walked into the hotel and sat down there and began talking about the Development Company, and he asked me about the trouble that we are making for Mr. Rosine out here, and he asked me what it was all about and I told him. I told him of the action of our trustees with reference to his subscription. I told him of our action, of the trustees, with reference to this subscription of that $250,000,

to which ruling the plaintiff excepted and its exception was allowed by the court;

Eighth: Because the court erred in refusing to give the jury instruction No. 16, as requested by plaintiff, as follows:

> "The plaintiff had the legal right to issue all of its common stock to John Rosene in part consideration of the conveyance by Rosene to it of certain mining properties and water rights, provided that all of its then stock subscribers and all of the holders of its capital stock then outstanding concurred therein; and if you find that all of plaintiff's common stock was issued to John Rosene for such properties, with the concurrence of all then stock subscribers and all of the holders of its capital stock then outstanding, then I instruct you that such issue was legal; and if you further find that all of the four hundred and ninety-nine thousand, nine hundred and eighty-nine (499,989) shares thereof alleged by Plaintiff and admitted by Defendant as issued to A. A. Housman & Co. for the benefit of the subscribers to the preferred stock of Plaintiff, there was thereafter by said A. A. Housman & Co. assigned to and is now held by Plaintiff sufficient for Plaintiff to issue and deliver to Defendant one share thereof for each five dollars ($5.00) paid on Defendant's subscription; then I further instruct you that such issue and delivery by Plaintiff to Defendant would be in performance of Defendant's subscription. And I further instruct you that the validity of the issue of Plaintiff's common stock in part consideration for the conveyance by Rosene of said mining properties to the Plaintiff would not in the least be affected by the fact that Rosene was making a commission as promoter if that fact was known to all directors of Plaintiff and all of its then stock subscribers and all of the holders of its stock then outstanding and there was no objection made by any of them thereto.

to which refusal plaintiff excepted and its exception was allowed by the court;

Ninth: Because the evidence showed that the common stock of plaintiff company, fully paid, was legally issued for a valuable consideration and was delivered as follows: $2,500,000, par value, as a bonus to the subscribers to the preferred stock of plaintiff company, $1,500,000, par value, as a bonus to John Rosine and his associates, promoters of plaintiff company;

Tenth: Because the evidence showed the fact that $2,500,000, par value, of the common stock of plaintiff company, fully paid, was issued as a bonus to the subscribers to the preferred stock of plaintiff company, and the further fact that $1,250,000, par value, of the common stock of plaintiff company, fully paid, was issued and delivered to John Rosene and his associates, promoters of plaintiff company, as a bonus, were known to defendant in the month of October, 1908, more than three years prior to the commencement of this action;

Eleventh: Because the evidence showed that the defendant's president reported the subscription in suit and the payment of $50,000 on account thereof out of defendant's funds, at a meeting of defendant's Board of Trustees held at Seattle within two weeks after the making of said subscription, and that upon receiving said report the defendant failed to repudiate the same, failed to notify plaintiff of any repudiation of same, and failed to place the plaintiff in statu quo;

Twelfth: Because the evidence showed that at a time when defendant had acknowledged that $75,000 of its funds had been paid to plaintiff to apply on account of the subscription in suit, to-wit: On September 5, 1906, it further ratified and confirmed said subscription by assuming to ratify and confirm it for the sum of $125,000;

Thirteenth: Because the evidence showed that there was no compromise entered into between the parties releasing defendant from further claim of liability on said subscription, as alleged in the second Affirmative Defense of Defendant's Amended Answer to the Amended Complaint;

Fourteenth: Because the evidence showed that plaintiff at all times subsequent to its organization had under its ownership and control a sufficient amount of the common shares of its capital stock, legally issued, for a valuable consideration, to be able to issue common stock, full paid, to all the subscribers in the preferred shares, including defendant, in performance of its subscription contract and the subscription in suit; and that plaintiff tendered into court, for defendant's benefit, 25,000 shares of common stock of plaintiff, legally issued, for a valuable consideration, to comply with said subscription in suit;

Fifteenth: Because the evidence showed that the allegations of the amended complaint and of the reply were true, and that the allegations of the answer were not true;

Sixteenth: Because the court erred in entering judgment that the plaintiff take nothing by this action, and that this defendant go hence without day and recover its costs;

Seventeenth: Because the court erred in not entering a judgment for plaintiff against defendant in accordance with the prayer of the amended complaint;

WHEREFORE, plaintiff prays that said judgment be reversed and that this Honorable Court will direct the entry of a judgment or decree in accordance with the prayer of plaintiff's Amended Complaint.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Appellee.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, the Maine Northwestern Development Company, a corporation, as principal, and Fidelity and Deposit Company of Maryland, as surety, acknowledge ourselves to be jointly indebted to the Northwestern Commercial Company, Appellee, in the above entitled cause, in the sum of ($500.00) Five Hundred Dollars, conditioned that:

WHEREAS, on the 2nd day of December, 1915, in the United States District Court, for the Western District of Washington, Northern Division, in an action depending in that court, wherein the Maine Northwestern Development Company was plaintiff and the Northwestern Commercial Company was defendant, numbered 2117 on the law docket, judgment was rendered against the Maine Northwestern Development Company, Plaintiff, and the said Maine Northwestern Development Company, having obtained an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court, to reverse the said judgment; and a citation directed to the said Northwestern Commercial Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of

Appeals, for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the 3rd day of May, 1916 next.

NOW, if the said Maine Northwestern Development Company shall prosecute its appeal to effect and answer all costs if it fails to make its appeal good, then the above obligation to be void, else to remain in full force and virtue.

MAINE NORTHWESTERN DEVELOPMENT COMPANY,
By T. A. Davies, its President.

(SEAL) Fidelity and Deposit Company of Maryland.
By J. A. Cathcart, Attorney in Fact.
Attest by L. J. Wyckoff, Surety.

APPROVED as to form and sufficiency of sureties this 7th day of March, 1916.

JEREMIAH NETERER,
District Judge, United States District Court, for the Western District of Washington, Northern Division.

Copy of the foregoing Bond on Appeal received at Seattle, Washington, this 7th day of March, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, for the Western Division of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

Notice of Lodgment of Statement.

To the Northwestern Commercial Company, the above named defendant, and to Messrs. Bogle, Graves, Merritt & Bogle, its attorneys:

You and each of you are hereby notified that the above named plaintiff has prepared and this day lodged in the office of the clerk of the above entitled court at Seattle, Washington, for you examination, a statement of all of the testimony introduced upon the trial of the above entitled cause essential to decision of the questions presented by the appeal of said cause heretofore herein petitioned for and allowed by the court, together with all objections and exceptions made and taken, to the admission or exclusion of evidence and all motions and rulings thereon made upon said trial;

And you are hereby further notified that the above named plaintiff will, upon the 20th day of March 1916, at the hour of ten o'clock

A. M., of said day, at the courtroom of the above entitled court in the United States Courthouse, in the City of Seattle, State of Washington, present said statement to the above entitled court and to the Honorable Jeremiah Neterer, the presiding judge thereof and the judge presiding at said trial, and ask said court and judge to approve the same.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Copy of the foregoing Notice of Lodgement of statement received in Seattle, Washington, this 7th day of March, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Notice of Lodgment of Statement of testimony. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington
Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Appellant,

vs

Northwestern Commercial Company, a corporation, Appellee.

Motion.

Comes now the Defendant, Northwestern Commercial Company, by its Attorneys, and moves the Court to recall the Citation issued over the signature of this Honorable Court under date of March 8, 1916, and to correct said Citation or, in the alternative, quash the same, because said Citation was improvidently issued and is not in proper and legal form, and contains recitals that are not correct in fact, in this: Said Citation, referring to the above entitled cause, contains a statement in words as follows: "Wherein an equitable defense was interposed by answer," when in fact no equitable defense was interposed in said action by answer or otherwise.

This motion is based upon the pleadings, records and files herein, including the memorandum opinion of this Court on file therein.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Copy of the within motion this 9th day of March, 1916, admitted.

WILLIAM H. GORHAM,
Attorney for Defendant.

Indorsed: Motion. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 9, 1916, Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs

Northwestern Commercial Company, a corporation, Defendant.

Order.

This day came on for hearing the motion of the defendant to recall the citation heretofore issued in the above entitled cause, citing the defendant to appear in the Circuit Court of Appeals on the appeal taken herein, and to amend or quash the same, and the Court, being of the opniion that the appeal herein having been perfected, it has no jurisdiction to consider said motion, the same is denied.

Ordered this 20th day of March, 1916.

JEREMIAH NETERER, Judge.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 20, 1916. Frank L. Crosby, Clerk. By F. L. C.

United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2117.

Maine Northwestern Development Company, a corporation, Appellant,

vs

Northwestern Commercial Company, a corporation, Appellee

Order as to Exhibits.

It appearing, in the opinion of the judge presiding in the United States District Court, for the Western District of Washington, Northern Division, necessary and proper that the original exhibits offered and received in evidence or filed in said cause on trial thereof, should be inspected in the above entitled court upon appeal,

IT IS ORDERED that said original exhibits be retained for safe keeping by the clerk of said District Court, to be by him transmitted under his hand and seal of said District Court to the clerk of the above entitled court at San Francisco, California, as a supplemental record herein upon appeal.

Dated Seattle, Washington, March 9, 1916.

JEREMIAH NETERER,
Presiding Judge in the United States
District Court for the Western District
of Washington, Northern Division.

Indorsed: Order as to exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 9, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2117

Maine Northwestern Development Company, a corporation, Appellant,

vs

Northwestern Commercial Company, a corporation, Appellee.

Certificate of Clerk, U. S. District Court to Original Exhibits

United States of America, Western District of Washington, ss

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that the attached documents constitute all the original exhibits introduced and received in evidence and used upon the hearing and trial of the above entitled cause, as follows:

PLAINTIFF'S EXHIBITS:

D1, D2, D3, D4, D5, D6, D7, D8, D9, D10, D11, D12, D13, D14, D15, D16, D17, D18, E1, E2, E3, E5, E11, E12, E13, E14, E15, E16, E17, E21, F, F1, F2, G, H, I, J, K, K1, L, M, N, N1, N2, S1, S1½, S2, S3, T1, T1, T4, T5, AA, BB, CC, DD, EE, FF, GG, HH;

Stipulation of parties, in re statement of W. R. Rust, dated July 2, 1915, filed July 15, 1915.

Exhibit (defendant's) marked for identification No. 3.

Stipulation of parties, in re amendment of pleadings, dated May 11, 1914, filed May 12, 1914, offered by plaintiff and excluded by the Court on the objection of defendant.

DEFENDANT'S EXHIBITS.

Nos. 1, 2, 4, 5, 6.

No. 3 for identification, offered by defendant, objected to by plaintiff, ruling reserved by Court on objection; offered by plaintiff and received in evidence;

which said original exhibits are herewith transmitted to the Circuit Court of Appeals, there to be inspected and considered together with the transcript of the record on appeal in the above entitled cause; which said exhibits are so transmitted pursuant to the order of the said District Court, so directing.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed my official seal, at Seattle, in said District, this 28th day of March, 1916.
(Seal)

FRANK L. CROSBY,
Clerk, U. S. District Court.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company ,a corporation, Plaintiff,

vs

Northwestern Commercial Company, a corporation, Defendant.

Praecipe for Record on Appeal.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare a record on appeal in the above entitled cause, consisting of the following:

(1) A caption exhibiting the proper style of court and the title of the cause; a statement showing the time of commencement of the cause; the names of the parties, the several dates when the respective pleadings were filed, the time when the trial was had and the name of the judge hearing the same; the several dates of the entry of the verdict of the jury, of the judgment, of the filing of the petition for appeal; of the allowance of said Petition by the court and of the filing of the Assignment of Errors.

(2) The Amended Complaint filed July 21, 1915;

(3) The Amended Answer to the Amended Complaint filed September 21, 1915;

(4) Plaintiff's Motion to Strike the Third Affirmative Defense of the Amended Answer filed October 2, 1915;

(5) The order granting plaintiff's Motion to Strike the Third Affirmative Defense of the Amended Answer, entered October 7, 1915;

(6) The Reply;

(7) The Statement of Testimony, as approved by the court and filed in said cause;

(8) Instruction No. 16 requester by the plaintiff;

(9) The verdict of the jury entered December 1, 1915;

(10) The judgment entered December 2, 1915;

(11) The Petition for Appeal, with allowance of the court;

(12) The Assignment of Errors;

(13) The Bond on Appeal;

(14) The Notice of Lodgment of Statement of testimony, together with the acknowledgement of service thereof on defendant;

(15) The Order of the court directing the exhibits to be transmitted on appeal to the Circuit Court of Appeals, for the Ninth Circuit;

(16) This Praecipe, together with acknowledgement of service thereof on defendant;

(17) The Citation on Appeal, with proof of service thereof on defendant;

(18) An Index to all of the above;

(19) Third Amended Answer to the Amended Complaint.

(20) Plaintiff's Demurrer to Third Amended Answer.

(21) Opinion on the Demurrer to the Third Amended Answer.

(22) Order Overruling Demurrer to Third Amended Answer.

all of the same to be duly certified under your hand and the seal of the above entitled court.

Dated Seattle, Washington, March 7th, 1916.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Copy of the foregoing Pracipe received this 7th day of March, 1916.

BOGLE, GRAVES MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Praecipe for record on appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Plaintiff,

vs

Northwestern Commercial Company, a corporation, Defendant.

Defendant's Praecipe for Record on Appeal.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

In addition to the record on appeal requested by plaintiff in its praecipe heretofore filed herein, you will please prepare for the record on appeal the following additional portions of the record in said cause, to wit:

1. Defendant's first amended answer to original complaint.
2. Plaintiff's motion to strike the first affirmative defense of the said amended answer, filed on the 24th day of February, 1913.
3. Order denying said motion to strike said first affirmative defense, entered on the 26th day of March, 1914.
4. Opinion of Neterer, District Judge, denying said motion to strike said first affirmative defense, filed March 25, 1914.
5. Motion to recall Citation.

6. Order denying motion to recall Citation.

These additional portions of the record are required by the Defendant to complete the record on appeal in said cause.

Dated: Seattle, Washington, March 11, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Copy of the foregoing praecipe for additional portions of the record required by defendant received this 11th day of March, 1916.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Service of within Defts. Praecipe this 11th day of March, 1916, and receipt of a copy thereof, admitted.

WILLIAM H. GORHAM,
Attorney for Appellant.

Indorsed: Defendant's Praecipe for Record on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 11, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation, Appellant,

vs.

Northwestern Commercial Company, a corporation, Appellee.

Certificate of Clerk of United States District Court, Western District of Washington, to Transcript of Record.

United States of America, Western District of Washington, ss

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing printed pages, numbered 1 to 208, inclusive, to be a full, true, correct and complete copy of the record and proceedings in the above entitled cause as is called for by the praecipe of the appellant and by the praecipe of the appellee, as the same remain of record and on file in the office of the Clerk of said Court and that said printed pages together with the original exhibits, separately certified, constitute the record on appeal from the final judgment of the United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California:

I further certify the following to be a true, full and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making the record,

certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's Fee (Sec. 828 R. S. U. S.) for making record, certificate or return 920 folios at 15c	$138.00
Certificate of Clerk to transcript of record—4 folios at 15c	.60
Seal to said Certificate	.20
Certificate of Clerk to original exhibits—3 folios at 15c	.45
Seal to said Certificate	.20
Statement of cost of printing said transcript, collected and paid	151.11
	$290.56

I hereby further certify that the above cost for preparing, certifying and printing said record amounting to $..... has been paid me by William H. Gorham, Esq., Attorney for Appellant.

I further certify that I hereto attach and herewith transmit the original Citation issued on appeal in said cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the Western District of Washington, at Seattle, in said District, this 28th day of March, 1916.

FRANK L. CROSBY,
(Seal) Clerk, U. S. District Court.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2117.

Maine Northwestern Development Company, a corporation, Appellant,

vs

Northwestern Commercial Company, a corporation, Appellee.

THE UNITED STATES OF AMERICA,

to the

NORTHWESTERN COMMERCIAL COMPANY,

a corporation, the above named appellee:

CITATION.

A GREETING:

You are hereby notified that in a certain action in the United States District Court in and for the Western District of Washington, Northern Division, wherein the Maine Northwestern Development Company is plaintiff and the Northwestern Commercial Company is defendant; and wherein an equitable defense was interposed by

answer, an appeal has been allowed the plaintiff therein to the United States Circuit Court of Appeals, for the Ninth Circuit;

And you are hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, thirty days after the date of this citation, to show cause, if any there be, why judgment appealed from should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable Jeremiah Neterer, Judge for the United States District Court, for the Western District of Washington, Northern Division, this 8th day of March, 1916.

JEREMIAH NETERER,
United States District Judge for the
Western District of Washington,
Northern Division.

Received a copy of the above and foregoing Citation this 8th day of March, 1916.

BOGLE, GRAVES, MERRITT, & BOGLE,
Attorneys for the Northwestern
Commercial Company, the
above named appellee.

Indorsed: No. 2117. United States Circuit Court of Appeals, Ninth Circuit. Maine Northwestern Development Company, Appellant, vs. Northwestern Commercial Company, Appellee. CITATION. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 9, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. William H. Gorham, Attorney for Appellant.